



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Tunoi, O’Kubasu JJ A & Onyango Otieno Ag JA)

CRIMINAL APPEAL NO 267 OF 2002

SILVANUS NJUKI NGUKU APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgement of the High Court of Kenya at Nairobi (Mr Justice Oguk) dated 14th August, 2000 in HCCr Appeal No 276 of 1999)

JUDGMENT

The appellant in this appeal, Silvanus Njuki Nguku, was charged before the Chief Magistrate’s Court at Nairobi with three counts. He pleaded not guilty to all the three counts and was after the full hearing found guilty and convicted on counts 1 and 3 by the trial magistrate. He was sentenced to serve 10 months imprisonment in respect of each count and the sentences were to run concurrently. He was dissatisfied with the decision of the trial court and he filed an appeal against the convictions in the superior court.

After the appeal was heard, the superior court in a considered judgment allowed the appeal on count 3 but upheld conviction on count 1. Count 1 was that of stealing by a person employed in the public service contrary to section 280 of the Penal Code and its particulars were that on diverse days between 19th and 25th November, 1997 at the Ministry of Foreign

Affairs and International Co-operation headquarters, Nairobi in Nairobi within Nairobi area, jointly with others not before court being a person employed in the public service namely Minister of Foreign Affairs he stole a cheque leaf No 15011 valued at Ksh 190,085.25= the property of the said Ministry of Foreign Affairs which came in to his possession by virtue of his employment.

The facts that gave rise to the same charge were that PW 9, Ann Nduku Mutua, who was then an advocate in Nairobi practicing as such advocate had rendered legal services to Uganda High Commission. She was entitled to some fees from the same Commission in respect of services rendered.

She demanded the payment and the Uganda High Commission forwarded to her letter Exh 1 in which there was a cheque for the amount of Ksh 190,081/25. This letter was forwarded to her through the Ministry of Foreign Affairs in Nairobi. The totality of the evidence on record shows that the letter plus the cheque was received at the Foreign Affairs secret registry, in Nairobi and was forwarded to open registry

in a file. The file plus the letter and cheque were received at the open registry and forwarded to the African Division where PW6, Bruce Madete, received the same on 20th November 1997 and marked the file to be taken to the legal section. Madete put the file with letters and cheque in the "OUT" tray so as to be taken to the legal section. That was the last time that the cheque was seen at the Foreign Affairs and International Co-operation headquarters in Nairobi. The file went missing together with the cheque. Later on 6th January, 1998, police at CID headquarters were contacted and PW16, No 214794 IP Daniel Mwangi together with another police officer went to the offices of the Ministry where they met Madete who reported to them that a cheque No 150511 dated 14th November, 1997, for Ksh 190,081/25 in the name of A N Mutua had been received at the Ministry but disappeared from the file. They were shown various items which were later produced as exhibits and they carried out investigations to ascertain the fate of the same cheque which had disappeared before it was handed over to the payee, Ann Nduku Mutua. The same investigation revealed that the cheque had been deposited into a newly opened account number 3890109 in the name of Mutua Anthony Nzuki at Barclays Bank Haile Sellasie Avenue.

That account was opened on 1.12.97. Apart from the amount paid to the bank for opening the account which was Ksh 3,000/=, no any other deposit was made into that account except the proceeds of the same cheque. By the time the discovery was made two withdrawals amounting to Ksh 190,004/= had been made from the account.

Inspector Mwangi and his team then went back to the Ministry's secret registry headquarters and took specimen handwriting of all the clerical officers working there. He took known handwritings of the appellant as well. They were then forwarded to a document examiner attached to CID Headquarters and were examined by PW15, Emmanuel Kenga. Inspector Mwangi also obtained during his investigation, the original account opening documents for account No 3890109. These included the forms filled and specimen cards. He also obtained from the registrar of persons the records of the actual holder of the identity card No 2892029 which was used to open the account aforesaid. The same records showed that the actual holder of the identity card No 2892029 was PW8 Evan Njagi Magu who lives in Kirinyaga. When traced Evan Njagi Magu denied having opened the account and denied any knowledge of the account and the subject cheque. Inspector Mwangi took the account opening documents in respect of the account No 3890109 to the document examiner. The fingerprints of the actual holder of identity card No 2892029 and those of the appellant were taken to PW7, Kenneth Soita who works with National Registration Department as a gazetted fingerprints officer for examination.

When the documents examiner's report was received, the appellant was arrested and charged with three offences. As we have stated hereinabove, he eventually faced conviction on the first charge only.

In his memorandum of appeal dated 16th October, 2003 and filed on the same date, the appellant raises mainly three grounds of appeal. These are:

"1. That the honourable judge erred in failing to find the case against the appellant was not proved to the standard required in law, was riddled with contradictions and inconsistencies and in any case the case was not proved beyond reasonable doubt and the honorable judge erred in that he did not accord the appellant the benefit thereof.

2. The honorable judge erred in law when he did not properly evaluate the evidence before him and the evidence that the identification of the appellant was not proper.

3. That the charge as laid was not proved."

The fourth ground was a complaint that the judge erred in not setting aside the sentence or reduce it in appropriate terms. It did not, in our humble opinion, amount to ground of appeal as all it complained of was that the judge dismissed the appeal on count 1 and that was in essence the reason of the entire appeal.

This is a second appeal, and that being so this Court can only entertain and consider matters of law. We have carefully considered the same. In our view, the first ground of appeal contained in the memorandum of appeal, though ambiguous on account of duplicity in that more than one ground of appeal are raised in

the same ground, only two matters are in fact raised in that ground and these are that the case against the appellant was not proved to the standards required in law and that the case against the appellant was riddled with contradictions and inconsistencies. Thus in effect, the appellant is claiming that the case against him as regards count 1 being of theft of cheque was not proved within the standards required in law; that there were contradictions and discrepancies in the entire case which did raise doubts in the case and the benefit of the same doubt should have been given to the appellant; that the appellant was not properly identified as the perpetrator of the offence for which he was convicted and that the charge as laid was not proved.

When he addressed us, the learned counsel for the appellant Mr Nyakundi emphasized two main aspects and these were first, that the cheque mentioned in the charge sheet as having been stolen was not produced in court and was not mentioned during the entire hearing of the case. That cheque was referred to as No 15011. The cheque that was produced in court and on which evidence was adduced was cheque No 150511.

Secondly, he contended that the document examiner's evidence upon which the appellant was convicted did not accord with the standards required for such evidence before the Court can rely on the same.

It is apparent from the face of the records that in the charge sheet the number of the cheque which was allegedly stolen was entered as 15011 whereas during the entire hearing the cheque that was referred to and which was produced was cheque No 150511. Exh 26 is a certified copy of cheque No 150511 for Ksh 190,085/25. The trial court and superior court did consider this error in the face of the charge and concluded that the correct cheque was No 150511. The appellant and his counsel were in court and they were aware throughout the hearing that the cheque that was allegedly stolen was cheque No 150511 and not No 15011 which never existed and the entry reflected what was already a typographical error. We do agree that this error did not prejudice the appellant and certainly did not occasion injustice. In our minds, nothing turns out on this ground.

The only evidence adduced against the appellant in the entire case is that of the handwriting expert. He was, as we have stated hereinabove, Emmanuel Kenga. He examined the savings account specimen signature card used for opening the account in Barclays Bank Exh 7 against specimen handwriting of the appellant and known handwritings of the appellant.

He found them, according to the report, to be in the same hand. This evidence was accepted by the trial court and the superior court as well and was relied on by the two courts. As we have stated, this evidence has been challenged before us as Mr Nyakundi, the learned counsel for the appellant, submitted that the document examiner should not have stated that in his opinion the handwriting was by the same hand. Mr Nyakundi contended that all the document examiner needed to do was to state the characteristics that would have enabled the Court to form its own opinion as to whether the appellant was or was not implicated. We have anxiously considered those submissions and particularly putting in mind that in this case the evidence of the document examiner was the only evidence that was relied upon for conviction. The case of *Hassan Salum vs Republic* [1964] EA 126 was a decision of Spry J who was then a judge of Tanganyika at Dar-es-Salaam. It is therefore only of persuasive authority but is certainly not binding on us. It was a case similar to this case in that the only evidence against the appellant was of opportunity to commit the offences and of a handwriting expert who stated that he had compared the questioned signature with a letter written by the appellant and specimens of the handwriting of the appellant and two other messengers in the same employment as the appellant and he had come to the conclusion that the signature on the receipt and the letter were written by the same persons the Court held in that case as follows *inter alia*:-

“(i) The most that an expert on handwriting can properly say in the appropriate case, is that he does not believe a particular writing was by a particular person or positively, that two writings are so similar as to be indistinguishable; the handwriting expert should have pointed out the particular features of similarity or dissimilarity between the forged signature on the receipt and the specimens of handwriting.” Spry J in coming to the above decision relied on and cited the passage from the decision of Lord Birkenhead in the case of *Wakefield v Lincoln* (Bishop)(1921), 90 LJ PC 174.

In our understanding, the above reflects what Mr Nyakundi was urging us to accept as the law. However, in 1969 the High Court of Kenya in an appeal heard by two judges (Mwendwa CJ and Farrel J) considered the same Tanganyika case in detail. That was in the case of *Onyango vs Republic* [1969] EA 362. The Court stated as follows:

“Although a judgment of the High Court of Tanzania is not binding on this Court, it has considerable persuasive authority and particularly when it falls (if we may say so) from so careful a judge. Nevertheless we do not think the passage cited provides sufficient support for the proposition sought to be based upon it. In particular we do not find anything in the remarks of Lord Birkenhead or of Lord Hewart in the passages cited which precludes the reception in evidence of the opinion of an expert that two documents were written by the same hand. Cross On Evidence, 3rd Edition at p 504 referring to proof of handwriting by comparison says this-

“ A document which is proved to have been signed or written by the person whose handwriting is in issue is first produced, and this is compared with the writing which is being considered by the Court. On the basis of such comparison, an expert in these matters may give evidence.”

Section 48 of our Evidence Act recognises the existence of handwriting experts, and expressly allows evidence to be given of their opinion “as to identity or genuines of handwriting.” It may be that if a positive opinion is given that a particular writing is in the hands of a particular person it should be received with caution, but it seems to us that at any rate under the law of this country, a handwriting expert must be allowed to give his opinion that two documents were written by the same hand. Otherwise it is not easy to see what sort of

“opinion” an expert can give on any matter concerning handwriting. That is precisely what the document examiner did in this case and we can find no substance in the submission that he went outside the proper province of a handwriting expert.

With regard to the further submission that it is for the Court to make up its own mind whether a particular writing is to be assigned to the particular person, we respectfully agree, but we do not think that in this respect the evidence of a handwriting expert is to be regarded in any different way from the evidence of experts in other subjects. An expert witness should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so. In many cases it is sufficient if the witness gives his opinion and the more eminent the expert the less the need for demonstration. A doctor may give his bare opinion as to the cause of death, and government analyst even in the rare cases where he is called as witness, may state without argument his conclusion (for example) that seminal stains were found on the clothing.

In every case the Court is entitled to accept or reject the opinion of the expert, and in that sense it must make up its own mind. The magistrate did so in this case.

There was no challenge to the competence of the document examiner, and his opinion was a confident one. In the context of the other evidence before her she accepted his opinion as correct. It might of course have been better if the witness had indicated either in his written report or in his evidence in court the grounds on which his opinion was based. We do not think this is a universal requirement and we note that of the cases relied on as suggesting that this must be done, neither *Wakeford vs Bishop of Lincoln* nor *R K Podmore* is mentioned in *Phipson on evidence* and in *Cross on evidence* (Loc Cit) the citation from the former case is prefaced by the words “strictly speaking.” In the instant case the magistrate had before her the disputed writing and the specimens, and also the confident opinion of the expert that they were in the same hand. We cannot say that she was in any way wrong in her approach to the evidence and conclusion which she drew from it.”

For obvious reasons, we do not apologise for the reproduction of a lengthy part of the case above for although it is not binding on us and is only of persuasive authority, we do feel nonetheless that it presents answers to the main part of the case before us for in the instant case document examiner’s evidence and the report he produced on the three documents presented to him (namely the questioned handwriting on

the documents used to open account, the specimen handwriting of the appellant and the known handwriting of the appellant) were not challenged in cross examination and that being the case, the trial court was perfectly correct in accepting the evidence and the learned judge in analyzing the case on first appeal was plainly right in accepting the same. That means that we are now faced with concurrent findings of the two courts below on matters of fact. As we have stated hereinabove, this being a second appeal, we can only deliberate on matters of law and we do not find it proper to interfere with the concurrent findings on matters of fact by trial court and the superior court. The evidence which was accepted by the two courts below proved that the appellant is the person who opened an account in false name, using false identity card on 1st December, 1997 and having opened the same account deposited the stolen cheque into the same account on that same day. We have not detected any contradictions in the evidence that was adduced by the prosecution witnesses in the entire case.

The inevitable conclusion we must come to is that this appeal lacks merit. It is dismissed.

We note that the appellant was released on bail pending appeal to the superior court, but we have not been told as to whether when the superior court confirmed his conviction and sentence on count 1, the same bail terms were cancelled as should have been done; neither have we been told whether he was thereafter placed on another bail pending appeal or whether the same terms were extended to cover the appeal to this Court. Whatever happened, the appellant had not served the sentence meted out by the trial court and we order that he be committed to prison to serve out his sentence as was ordered by the trial court. Judgment accordingly.

Dated and delivered at Nairobi this 13th day of February, 2004

P.K.TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

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Ag JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR