



**Mudaki v Republic (Criminal Appeal 75 of 2023)  
[2024] KEHC 5963 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5963 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 75 OF 2023  
DR KAVEDZA, J  
MAY 28, 2024**

**BETWEEN**

**PATRICK ALMANOS MUDAKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the original conviction and sentence delivered by  
Hon. P. Mutua (SPM) on 17th November 2022 at Kibera Chief Magistrate's  
Court Criminal Case no. E1011 of 2021 Republic vs Patrick Almonos Mudaki)*

**JUDGMENT**

1. The appellant was charged and convicted on two counts of stealing contrary to section 268(1) as read with section 275 of the *Penal Code*. He was sentenced to pay a fine of Kshs. 20,000 in default to serve 6 months imprisonment in Count I, and Kshs. 50,000 in default to serve 12 months imprisonment in Count II. Being aggrieved, he challenged the conviction and sentence on appeal.
2. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the prosecution did not discharge the burden of proof beyond reasonable doubt. He urged the court to quash his conviction and set aside the sentence.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution called three witnesses to testify. PW1, Justin Kivuvi Mwendwa, testified that on 24/4/2021, he issued an open cheque for Kshs. 100,000 to his employee, Stephen Karanja (PW2), as a loan. The next day, PW2 reported the cheque missing, suspecting the appellant had taken it. On 28/4/2021, PW1 was informed by his bank that the appellant who worked as his cook, had cashed



the cheque. The appellant admitted to cashing it but disappeared when asked to refund the money on 30/4/2021. PW1 reported to Muthangari Police Station. On 13/05/2021, the appellant, with labour officers, demanded his dues, but PW1 called the police who arrested him. The cheque was in the name of Thirsty Earth Limited, where PW1 is the sole Director.

5. PW1 identified evidence including PW2's loan application, the open cheque, bank statements, and Mpesa statements. Under cross-examination, PW1 stated the appellant was his employee earning Kshs. 28,000, and denied giving him a post-dated cheque. He claimed ignorance about the missing cheque until 26/4/2021 and denied fabricating the case to avoid paying terminal dues. He clarified that the police were informed before appellant demanded dues.
6. PW2, Stephen Karanja Mwangi, testified that on 24/4/2021, PW1 gave him an open cheque of Kshs. 100,000 as a loan, intending to decide later who the payee would be. He inadvertently handed the cheque to the appellant, who was also given some documents. When he realised the cheque was missing, he informed PW1. On 28/4/2021, PW1 informed him that the cheque had been cashed by the appellant who did not deny it. On 30/04/2021, they went to the bank with the appellant to withdraw the money, but the appellant disappeared. He reported the incident to the police on 1/5/2021 and is repaying the loan despite never receiving the money.
7. PW3, PC David Njoroge of Hardy Police Station, testified that he investigated the matter reported at Muthangari Police Station and charged the appellant. He presented several pieces of evidence including the loan application form, the cheque, bank statement, transaction records, certificate of incorporation, CR 12, and Mpesa statement. During cross-examination, PW3 clarified that the matter was reported by both PW1 and PW2 on 1/5/2021. He obtained the blank cheque from PW1's offices but lacked a confirming letter for its authenticity. He was unaware of any labour dispute between the appellant and PW1 and arrested the appellant when he followed up on labour issues with PW1. He did not consult a Document Examiner regarding the cheque and had no proof that PW2 was employed by the company.
8. The appellant, in his defence, claimed PW1 gave him the cheque as appreciation for his service, not instructing him to refund it until after he was sacked. He denied stealing the cheque or receiving any documents from PW2. He asserted that PW1's motive was to avoid paying his terminal dues.
9. DW2, Martin Papa, a retired Chief Inspector of Police and Document Examiner, testified that the name on the cheque resembled PW1's handwriting, not the appellant.
10. DW2 Martin Papa a retired Chief Inspector of Police and a Document Examiner testified that he examined and analysed cheque no. 000005 and found the name thereon to be in handwriting similar to that of PW1 but different from that of the appellant.
11. The appellant also challenged the totality of the prosecution's evidence against which he was convicted. He contended that the prosecution did not prove the case beyond reasonable doubt. In addition, the ingredients of the offence of stealing were not established.
12. It is not disputed that the appellant was employed by the PW1. It was during the said employment that a blank cheque that had been issued to PW2 went missing. The cheque was later reported to have been banked by the appellant and the appellant drew money. PW2 corroborated the said evidence maintaining that he was issued the said cheque by PW1 but inadvertently gave it to the appellant who later banked it to his benefit. He maintained that the appellant admitted this when questioned.
13. The elements of stealing are as set out in section 268 of the *Penal Code* below:  
268. .



- (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -
  - (a) an intent permanently to deprive the general or special owner of the thing of it;
  - (b) an intent to use the thing as a pledge or security;
  - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
  - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
  - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

14. Section 108 of the *Evidence Act* Cap 80 (Laws of Kenya) provides that: -

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

15. Further, Section 109 of the *Evidence Act* stipulates that: -

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

16. The appellant did not deny being employed by PW1 but claimed he had since left the job. He admitted to banking the cheque but asserted it was given to him as an employment benefit and denied stealing



it. He argued the charges were framed because his former employer did not want to pay him what he was owed.

17. From the record, there is no evidence that the appellant was issued the cheque by his employer the complainant herein as alleged. The appellant laboured to prove his legitimate claim of an alleged employment dispute between himself and his employer. The prosecution proved beyond reasonable doubt that the cheque was in fact stolen. In addition, the theft report was made before the appellant's employment was terminated. The appellant's defence when weighed against the prosecution's evidence collectively establishes the appellant's culpability in the theft
18. Having critically analysed the evidence on record, this court was satisfied that the Learned Trial Magistrate did not err when he convicted the Appellant for the charged offences.
19. On sentence, the appellant was to pay a fine of Kshs. 20,000 in default to serve 6 months imprisonment in Count I, and Kshs. 50,000 in default to serve 12 months imprisonment in Count II. It is my view, the sentence imposed was legal and justified under the circumstances.
20. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.  
Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF MAY 2024**

---

**D. KAVEDZA**

**JUDGE**

In the presence of:

Kimanthi h/b for Nyambena for the Appellant

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

