



REPUBLIC OF KENYA



**Mugoyia v Republic (Criminal Appeal E142 of 2021)  
[2024] KEHC 7844 (KLR) (Crim) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7844 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E142 OF 2021  
GL NZIOKA, J  
JUNE 28, 2024**

**BETWEEN**

**CYRUS KILIZA MUGOYIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of; Hon. E. Kimilu (Senior Principal Magistrate) delivered on 24th November, 2021, vide Criminal Case No. 1356 of 2018, at the Chief Magistrate's Court at Milimani Law Courts, Nairobi)*

**JUDGMENT**

1. The appellant was arraigned before the Chief Magistrate's court charged vide Chief Magistrate's Criminal Case No. 1356 of 2018, in three counts. In count one (1) he was charged with stealing contrary to section 268(1) as read with section 275 of the Penal Code (cap 63) Laws of Kenya.
2. The particulars of the offence are that on dates between the 27<sup>th</sup> day of February, 2018 and 13<sup>th</sup> day of July 2018 at Lichi Security Systems Ltd office at Bhavesh Centre at Ngara in Nairobi within Nairobi County stole cheque leaf numbers xxxx, xxxx, xxxx, xxxx and xxxx all valued at Kshs 60/- the property of Lichi Security Systems Ltd.
3. He was charged in count two (2) with the offence of forgery contrary to section 345 as read with section 349 of the Penal Code
4. The particulars of the offence are that on dates between the 27<sup>th</sup> day of February 2018 and 13<sup>th</sup> day of July, 2018 at unknown place within the Republic of Kenya with intent to steal, forged certain documents namely cheque leaf numbers xxxx, xxxx, xxxx, xxxx and xxxx purporting them to be



genuine and valid cheques drawn, signed and issued by Peter Wanjau Matemo the former Director of Lichi Security Systems Ltd.

5. In count three (3) the accused was charged with the offence of stealing contrary to section 268(1) as read with section 275 of the Penal Code.
6. The particulars of the charge are on the 1<sup>st</sup> day of January 2018 at Barclays Bank Bunyala Branch in Nairobi within Nairobi County jointly with others not before court stole cash Kshs 1,340,100 (one million three hundred forty thousand shillings) the property of Lichi Security System Ltd.
7. The appellant pleaded not guilty to all the charges and the case proceeded to full earring with prosecution calling a total of eight (8). The prosecution case in a nutshell is that, the complainant had employed the appellant as an assistant accountant and assigned banking business in its branch in Nairobi.
8. That on 29<sup>th</sup> May 2018, the complainant's managing director (PW1) Benjamin Maingi Kirimi received a call from Barclays Bank (K) Limited clearing department inquiring as to whether he had issued a cheque in the sum of Kshs 166,000 payable to David Siayo.
9. (PW1) Benjamin Maingi Kirimi informed the bank that he did not know the payee and as a result he visited the bank and requested for a bank statement. Upon receipt thereof, he discovered that several cheques had been cleared and paid out to people unknown to the complainant. He then alerted the bank.
10. PW1 Kirimi further testified that a sum of Kshs 64,300 vide cheque No. 018409 was paid to Tracy Stationary and Printing Services which was unknown to the complainant. That the cheque was deposited by the holder of telephone number 0721xxxxxx, which was known to belong to the appellant.
11. Further a sum of Kshs 166,000 was paid to David Siayo vide cheque No. xxxx, Kshs 46,200 to Kijomu Solutions Services vide cheque No. xxxx, and a further payment of Kshs 50,000 to Kijomu Solution Services vide cheque No. xxxx and deposited by the appellant and holder of cell phone No. 0722xxxx.
12. That, the initial cheques were drawn by the complainant, written NSSF in abbreviation and were intended to pay National Security Social Services as remittance for its employees.
13. That request for the cheques was made to Taifa Sacco and banker's cheques were issued accordingly. That, upon receipt of the cheques the appellant altered them and wrote "Nuclear Stationery and Super Furniture" in full words after the words "NSSF".
14. It was the evidence of (PW1) Mr. Karimi that the cheques so fraudulently paid amounted to a sum of Kshs 797,600. That he was advised and he did report the matter to Banking Fraud investigation Unit (BFIU). The investigations commenced and at the conclusion thereof the appellant was arrested and charged accordingly.
15. At the conclusion of the prosecution case, the trial court ruled that the appellant had a case to answer. In a lengthy unsworn statement in defence, he denied inter alia, committing the offences levelled against him and having been employed by the complainant as an accountant. He testified that he was working as an administrator and his duties were to prepare a payroll and send it to the head office in Nyeri. That all the requisition for cheques was done at Nyeri.
16. The appellant tore into the prosecution case, discrediting the evidence adduced as being manipulative. He argued that the list of the complainant's clients produced was altered to omit some of the



- complainant's suppliers. In a manner of submissions, he ran over the evidence of the prosecution witness pointing out variances and/or inconsistencies. He also stated that key witnesses were not called.
17. He further stated that his tribulation was due to a grudge between him and PW1 Mr Kirimi, the managing director over his failure to testify against a colleague, one Gladys, in an unprocedural dismissal proceedings. Further by; the failure to submit PAYE, to be accorded annual leave, and PW1 Kirimi's opposition to his advancement of education to the university level. He sought to be acquitted on all the charges.
  18. However, by a judgment delivered on 24<sup>th</sup> November 2021 the trial court found the appellant guilty on all the three counts and convicted him accordingly. He was then sentenced as follows:
    - a. In count 1 to pay a fine of Kshs. 100,000 and in default to serve one (1) year imprisonment.
    - b. In count 2 to pay a fine of Kshs. 100,000 and in default to serve one (1) year imprisonment.
    - c. In count 3 to pay a fine of Kshs. 300,000 and in default to serve two (2) years imprisonment.
  19. However he is aggrieved by the decision of the trial court both on conviction and sentence and appeals against it on the following grounds:
    - a. The learned magistrate erred in law and facts by convicting the appellant for an offence of stealing under section 268(1) as read with section 275 of the Penal Code while there was instructively no sufficient evidence to sustain the particular offences
    - b. That the learned magistrate erred in law and fact by convicting the appellant for an offence of forgery to section 345 as read with section 349 of the Penal Code while there was instructively no sufficient evidence to sustain the particular offence.
    - c. The trial magistrate erred in law in failing to find that the essential ingredients for the said offences were not proved and that the particular charges before the court could not be upheld.
    - d. The learned magistrate erred in law and in fact by disregarding mandatory statutory provisions of the Evidence Act cap 80 on production of documentary evidence during trial.
    - e. The learned magistrate erred in law and in fact in disregarding and/or failing to apply the binding decisions of the superior courts.
    - f. The learned magistrate erred in law and in fact in failing to uphold objections by the defence on inadmissibility of documentary evidence and subsequently held that no prejudice would be suffered by the appellant only to use the very same documents in convicting the appellant.
    - g. The learned magistrate erred in law in applying the appellant's unsworn evidence to make a finding against the appellant.
    - h. The learned magistrate erred in law and in fact in failing to consider that no evidence was adduced to support the allegations that the appellant was tasked with banking on behalf of the complainant Lichi Security Systems Ltd and thus fell into error when she arrived at findings and conclusions unsupported by the record.
    - i. The learned magistrate erred in law and in fact in failing to take into account the prosecution's witnesses' evidence during trial that the complainant's i.e. Lichi Security Systems' client manual Book containing the full list of clients was instrumental in the matter yet it was never produced.



- j. The learned magistrate erred in law and in fact in failing to find exhibit 19 purportedly the list of clients was produced after the defence counsel cross examined the prosecution's witness over the customer manual book containing the full list of clients and as such was skewed and/or manipulated to suit the prosecutions case.
  - k. The learned magistrate erred in law and in fact failing to take into account the prosecution's witnesses evidence during trial that the prosecution failed to produce key documentary evidence supporting allegations of complaints raised by employees of Lichi Security Systems Ltd over deductions and/or fraudulent diversions of monies and/or unpaid amounts to National Social Security.
  - l. The learned magistrate erred in law in either failing and or omitting to find that both the investigation officer and the prosecution had failed to diligently discharge their duties for either failing and/or neglecting to call key witnesses from Barclays Bank Bunyala Branch and Taifa Sacco thereby wrongly convicting and sentencing the appellant
  - m. The learned magistrate erred in law and in fact in failing to take into account the evidence adduced during trial and thus fell into error when she arrived at findings and conclusions unsupported by the record.
  - n. The learned magistrate erred in law and in fact in ascribing undue and disproportionate weight to the duplicitous prosecution witnesses written statements when it was apparent that the particulars of the offences were fundamentally at variance with their evidence adduced during trial.
  - o. The learned magistrate erred in law and in fact in ascribing undue and disproportionate weight to the duplicitous document examiner's report when it was apparent that it was not supported by the evidence by prosecution witnesses.
  - p. The learned magistrate erred in law and in fact by convicting and sentencing the appellant on the basis of prosecution's evidence which was fundamentally at variance with the particulars of the offences as framed in the charge sheet and had no relevance and/or probative value.
  - q. The sentence passed/metted against the appellant by the trial court was manifestly founded on a biased court proceedings and is unfairly punitive and oppressive considering the facts and circumstances of the alleged offences.
  - r. The trial magistrate erred in law by either failing and neglecting to reasonably consider the averments and submissions of the defence because had he done to he would have concluded and come to the finding that the appellant was not guilty of the particular offence before the court.
20. As a result, he prays that the appeal be allowed, the judgment be set aside in its entirety, conviction and sentence be set aside and he be acquitted of all the charges.
21. The respondent did not file any response to the appeal. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated 26<sup>th</sup> July, 2022, and argued that the prosecution had the onus of proving the essentials of the elements of a charge. He relied on the case of; Republic vs Silas Magongo Onzere, cited in Sudipto Sarkar VR Mnophar, Sarkar's Law of Evidence (1872) Vol.2 15<sup>th</sup> Edition.



22. He reiterated that the evidence adduced in the trial court was not sufficient to sustain the charges facing him thus the learned trial Magistrate erred in failing to find that the essential ingredients were not proved.
23. As regard the offences of stealing in counts (1) and (3), the appellant relied on Archbold, Criminal Pleading Evidence and Practice (1997) where the term stealing was defined and the ingredients of the offence stated as being; a) dishonest, b) appropriation, c) of property belonging to another and d) with the intention of permanently depriving the owner of such property.
24. That, the prosecution failed to produce any documentary evidence that he was employed by the complainant as an accountant and tasked with banking duties.
25. Further, the prosecution did not produce its manual book which contains a full list and details of its customers, despite (PW2) acknowledging its existence. That the said manual book would have proved that the recipients of the amounts in issue were known to the complainant's company and had traded with it thus deserved to be paid.
26. He relied on the case of; R vs Uberele (1938) EACA 58) where the Court of Appeal for Eastern Africa stated that the court is entitled to presume that evidence which could be produced but was not produced would be unfavourable to the person holding such evidence.
27. The appellant argued that, the prosecution introduced a computer printout document allegedly containing the complainant company's full list of clients. That the trial Magistrate disregarded the provisions on production of documentary evidence including section 65(8) of the *Evidence Act* (Cap 80) Laws of Kenya, and dismissed his objections on the production of computer printouts and photocopies holding that he would not be prejudiced by their production yet the learned trial Magistrate relied on the said documents to convict him.
28. Further, the prosecution failed to produced cheques No. 01xxxx, 01xxxx, 01xxxx, and 01xxxx to prove the complainant's allegations that the money was to be used for paying its employees National Social Security Fund (NSSF).
29. That, despite the prosecution witnesses testifying that employees made oral and written complaints due to the unremitted NSSF amounts, no employee was called to testify on the same and neither did the prosecution produce any such written complaints,
30. Further, despite the prosecution stating that NSSF had issued a statement of account showing the unremitted amounts, no such statement was produced in the trial court.
31. He faulted the trial Magistrate for giving undue and disproportionate weight to the prosecution evidence despite the fact that it was duplicitous and contradictory. That, PW8 gave evidence that on 28<sup>th</sup> May 2018, she was the teller on duty and received all the cheques in issue yet the cheques have a stamp of receipt bearing different teller number or identities, dates of receipt, and different indications of the person who deposited them. As a consequence, the learned trial Magistrate made an erroneous finding that the appellant deposited the cheques received by PW8.
32. Further, PW1 gave contradictory evidence on whether it was the Clearing Department of Barclays Bank of Kenya or Taifa Sacco that raised the red flag with regards to the cheques. That, no witnesses were called from the two institutions to testify on the issue despite the fact that employees from Taifa Sacco were mentioned numerously as one of the parties that prepared and processed the cheques. That in the circumstances, it was difficult to ascertain if an alarm was raised or whether the beneficiaries of the cheques were not the actual intended beneficiaries.



33. Additionally, the appellant submitted that the prosecution failed to avail the cheque book from which the allegedly stolen cheques were plucked and which cheque book was allegedly recovered from him. That, PW4 Phylis Njeri Muhia testified that there was no handing over report and therefore it was not possible to ascertain whether the cheque book was indeed recovered from him.
34. On the charge of forgery in count 2 the appellant submitted that no sufficient evidence was tendered to prove the intent to defraud or deceive. He cited the case of; Peter Ngugi Thotho vs Republic Criminal Appeal No. 50 of 1996 where the Court of Appeal cited the English case of Ex Parte Charles Windsor [1865] 10 Cox C.C 118 which stated that forgery is the false making of an instrument purporting to be that which it is not, it is not making of an instrument which purports to be what it really is, but which contains false statements. That the document examiner's evidence and report did not attribute the forgery to him and that he did make the false documents.
35. Further, his name did not appear in the said report but only in the exhibit memo form. He relied on the case of; Parvin Singh Dhalay vs Republic Criminal Appeal No. 10 of 1997 where the court quoted the case of; Elizabeth Kamene Ndolo vs George Matata Ndolo Civil Appeal No. 128 of 1995 which held that the evidence of experts must be considered along with all other evidence and the trial court has a duty to decide whether or not it believes the expert and the reason for its decision.
36. The appellant further submitted that, the reliance on a photocopied document as a specimen sample of signatures was prejudicial and cited the case of; Samson Tela Akute vs Republic [2006] eKLR where the court stated it could not discount the possibility that someone can lift a signature and put it on a document taking into account that the document was a photocopy.
37. He argued that the court found that the expert witness made concessions inter alia that an original signature and a signature on a photocopy can differ on the machine used and how the photocopying was done and held that the doubts raised regarding the authenticity of the documents should have been resolved in his favour.
38. On count 3, the appellant submitted that, no evidence was tendered to prove; that he visited Barclays Bank Bunyala Road Branch on 1<sup>st</sup> January 2018, which was a holiday, and stole or transferred the money to himself or that the complainant lost the sum of Kshs. 1,340,100, and he benefited from the said amount.
39. That, no witness from Barclays Bank, Bunyala Road Branch was called as a witness nor did the bank statement produced by the prosecution bear any transaction on 1<sup>st</sup> January 2018 to show that the complainant lost the sum of Kshs. 1,340,100 to him or any other person. Thus, the learned trial Magistrate erred in holding that the amount of monies credited into accounts allegedly held by him totalled Kshs. 1,340,100 and he benefited from it.
40. Furthermore, that PW1 Mr Kirimi contradicted himself on the amount of money lost. That he stated the complainant company lost Kshs. 542,00 but confirmed the cheques produced to court amounted to Kshs. 400,000. Therefore, the trial Magistrate erred in holding that a total sum of Kshs. 797,000 was never remitted to the NSSF without any corroborating evidence.
41. The respondent did not file any submissions despite being afforded opportunities to do the so.
42. Be that as it were, I note that, as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.



43. In the instant matter the appellant was charged with the offences of stealing in count (1) and (3). The offence is stipulated under section 268 of the Penal Code as follows: -

- (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.”

44. Pursuant to the afore provisions to prove the offence of stealing two crucial elements must be established; conversion and fraudulent intent. In that respect the Court of Appeal in; John Muiruri Kagunyi v Republic [1982] eKLR stated that stealing consists of taking anything “fraudulently and without claim of right”.

45. Furthermore, to prove fraud, the prosecution is required to establish that the accused persons formed the mens rea to deprive the owner of ownership of the thing stolen. In Philip Muiruri Ndarunga v Republic (2016) eKLR, the court stated as follows:

“It is a cardinal principle of criminal jurisprudence that mens rea of the accused person is very much essential ingredient to prove the guilt against the accused. The essence of criminal law has been said to lie in the ‘maxim lactus non facitrem nisi mes sit rea’. There can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist.”



46. In analysis the evidence herein reveals that, the complainant used to remit funds to NSSF on behalf of its employees. That the cheques would be drawn payable to NSSF, in abbreviation and once signed they would be delivered to the appellant via PSV and/or emailed his email address “xxxx@gmail.com. The cheques would be accompanied by a list of the employees whose remittance was being paid and the secretary Phillis Njeri copied in.
47. PW3 Catherine Muringe testified that she used to requisition for the banker’s cheque and if she was not available, Elizabeth Rukwaro would step in. She identified the requisition she made marked P.exhibit 10 and those made by Elizabeth P.exhibit 7, 8 and 13.
48. I note from the exhibits included in the record of appeal that, documents produced at pages 29 to 32 of the record of appeal were issued by Taifa Sacco to whom the requisition of the cheques was addressed however, those documents are not legible and therefore not useful.
49. Be that as it were, the evidence reveals that cheques were actually issued by Barclays Bank (K) Limited drawn on the account of the complainant Lichi Security System in favour of the following payees:
- a. No. xxxx (Pexh 4) for Kshs 46,200 payable to Kijoma Solutions Services
  - b. No. xxxx (pexh 5) for Kshs 50,000 payable to Kijoma Solution Services
  - c. No.xxxx (pexh7) for Kshs 60,000 payable to Kijoma Solution Services
50. I note the cheques listed in count (1) are No (s); xxxx, xxxx, xxxx, xxxx and xxxx. However, I further note that PW1 Mr Kirimi in his evidence referred to cheques No(s). xxxx, xxxx, and xxxx which is different from xxxx stated in the charge sheet. He also referred to cheque No. xxxx in the sum of Kshs 50,000 payable to Kijomu Solutions Services, but did not refer to Cheque No. xxxx.
51. Be that as it may, PW5 No. xxxx Inspector Alphonse Lipashe attached to Jomo Kenyatta International Airport at DCIO’s office testified that he was a former investigator in the matter. That he was given the complainant’s bank statement from Barclays Bank (K) Limited and noticed therefrom that a cheque No. xxxx dated 29<sup>th</sup> May 2018 had been cashed.
52. Further cheque No. xxxx in the sum of Kshs 156,000 had been deposited on 5<sup>th</sup> June 2018 and cashed. That he obtained a search warrant from the court, and obtained the following cheques all payable to NSSF but altered and the words “Nuclear Stationery and Super Furniture added: -
- a. xxxx for Kshs 50,000
  - b. xxxx for Kshs 60,000
  - c. xxxx for Kshs 166,000
  - d. xxxx for Kshs 46,200
  - e. xxxx for Kshs 118,400
53. PW7 Irungu Evans an employee of Cooperative Bank (K) Limited testified that upon the bank being served with a search warrant issued by the court, he retrieved account opening documents in respect to their customer Nuclear Security and Super Furniture Account No. xxxxxx. Attached was account opening account mandate identity card of Cyrus Kiliza Mugoia. He also gave out the bank statement for the period 1<sup>st</sup> July 2018 to 20<sup>th</sup> July 2018. That the statement showed a cheque for Kshs 118,400 issued by Cooperative Bank limited at Nyeri Branch payable to Nuclear Stationery and Furniture had been cashed.



54. PW7 Irungu also produced account opening document in respect of Tracy Stationery and Printing Services being account No. 0114xxxxxxxx, the account opening mandate and bank statement for the period of 24<sup>th</sup> May 2016 to 11<sup>th</sup> September 2018. The account was opened and operated by the appellant.
55. PW9 Margaret Kemunto from Kenya Commercial Bank produced a bank statement of; Kijoma Solution Services accounts No(s) xxxxxx and No.xxxxxx for the period 7<sup>th</sup> January 2018 to 17<sup>th</sup> May 2018 and 1<sup>st</sup> January 2018 to 25<sup>th</sup> November 2020 respectively. That the statement showed three cheques were deposited in the account of Kijoma account and two in the account of David Siayo.
56. That, the cheques deposited in the account of Kijoma account were cheque numbers: -
- a. xxxx for Kshs 50,000 on 5<sup>th</sup> April 2018
  - b. xxxx for Kshs 60,000 on 28<sup>th</sup> February 2018
  - c. xxxx for Kshs 46,200 on 15<sup>th</sup> May 2018 in the account of David Siayo
  - d. xxxx for Kshs 166,000 on the 28<sup>th</sup> May 2018
57. That the cheques deposited in the account of Kijoma were cashed but that of David Siayo was dishonored due to insufficient funds.
- The question is who is Kijoma Solutions Services? The bank statement of the customer produced by PW8 Margaret Kemunto reveal that, on 9<sup>th</sup> April 2018, a cheque No. xxxx was deposited into the account, and at that time the credit balance on the account was Kshs 421.40. Thus the total sum when the cheque cleared was Kshs 50,421.50. On the same a sum of Kshs 50,000 was withdrawn by Cyrus Kiliza Mugoiya leaving a credit balance of Kshs 366.50.
58. On 17<sup>th</sup> May 2018, a cheque No. xxxx in the sum of Kshs 461,200 was deposited into the account giving rise to a credit balance of Kshs 46,616.50. On the same day the appellant Cyrus Kiliza Mugoyia withdrew Kshs 46,000 leaving a credit balance of Kshs 561.50. On 2<sup>nd</sup> January 2018, a cheque No. xxxx in the sum of Kshs 60,000 was deposited in the subject account. The total balance came to 60,476.50. On 3<sup>rd</sup> March 2018, Kshs 40,000 was withdrawn and on 8<sup>th</sup> March 2018 Kshs 26,000 was withdrawn leaving a balance of Kshs 421.50.
59. From the afore evidence, it is clear that those cheques in question drawn on the account of the complainant were banked into the account of Kijomu Solution Services and the proceeds thereof withdrawn by the appellant. In my considered opinion therefore the burden of proving that Kijoma Solution Services had rendered services and/or supplied goods to the complainant to warrant the payment lie on the beneficiary of the funds.
60. I shall now turn to cheque xxxx for the sum of Kshs 166,000. The prosecution evidence is that, the same was not paid as it was dishonoured for lack of sufficient funds. Furthermore, from the bank statement produced by PW8 Kemunto, the subject cheque was deposited on 30<sup>th</sup> May 2018 and unpaid on 29<sup>th</sup> May 2018. The dates don't add up. Even then there is no evidence that, the appellant transacted on that account.
61. The last cheque is No. xxxx for a sum of Kshs 118,400. The same was deposited into the account of Nuclear Stationery and Super Furniture on 14<sup>th</sup> July 2018. On 16<sup>th</sup> July 2018 a sum of Kshs 70,000 was withdrawn leaving a credit balance of Kshs 49,429.20 on the account. On 17<sup>th</sup> July 2018 a sum of Kshs 48,400.00 was withdrawn leaving a credit balance of Kshs 990.70. Furthermore, evidence in the



form of a certificate of registration of the Nuclear Stationery and Super Furniture indicates that, the subject business was carried on by Cyrus Kiliza Mugoyia the appellant.

62. That evidence is supposed by the evidence of Irungu Evans (PW7) from Cooperative Bank where the customer account was domiciled and which revealed the account No. xxxxxx was opened by the appellant Cyrus Kiliza Mugoyia Identity No. xxxxx. It further reveals that the cheque was issued at Cooperative Bank (K) Ltd Nyeri branch drawn on complainant's account. I have looked at the physical cheque and it reads NSSF (Nuclear Stationery and Super Furniture).
63. The question that arises, how did a cheque allegedly drawn by the complainant to pay for NSSF dues of its staff reach the account operated by the appellant, who was its employee, altered and banked into an account he operated?
64. The complainant denied having issued the suspect cheques to the appellant. That they had no relationship with the payee. The appellant is the common denominator between the drawer of the cheques and payee. He was an employee of the complainant. It is in evidence that, he was the custodian of the cheques and/or dealt with them.
65. The cheque to Nuclear Stationery and Super Furniture clearly indicates that it was payable to NSSF and the above names added in words and bracket. That supports the prosecution evidence that the same was meant to pay employee due at NSSF.
66. Against the afore evidence the appellant denies the offence and states that, the cheques were payable to the complainant's clients and that, the list thereof which the complainant produced as Pexh. 19 was incomplete. I find that nothing would have been easier for the appellant to produce evidence of services or goods rendered to the complainant to deserve lawful payment.
67. I therefore find the defence is untenable. Upon proof that the cheques were issued and cashed by the appellant, then in the absence of rebuttal to prove he obtained them lawful, the logical conclusion is that he stole the cheque.
68. Furthermore, it is evident from the bank accounts produced by the prosecution witness PW7 Irungu and PW8 Kemunto that the payees accounts were operating at minimal balances and the subject cheques herein would be deposited and the cash withdrawn the same day to the minimal balance and/or eroded immediately thereafter. The only cheque that survived was the one dishonoured for lack of sufficient funds.
69. In my considered opinion the hurried withdrawal casts aspersion on the payee's conduct. Be that as it may, I find sufficient prosecution evidence to prove the charge in count (1) save for the cheque No. 002770, but which apparently is held to have been forged by the appellant as per the finding of the document examiner, which I shall deal with in count (2).
70. I Shall now deal with count (2) The appellant was convicted of the offence of forgery provided for under section 345 of the Penal Code as follows-

“Forgery is the making of a false document with intent to defraud or to deceive”.



71. The elements of the offence of forgery were considered by the Court of Appeal in the case of; Republic v Omar (Criminal Appeal 50 of 2018) [2023] KECA 293 (KLR) (17 March 2023) (Judgment) where it was stated that: -
- “We agree with the learned Judge that for one to be convicted of the offence of forgery, evidence must be led to prove that he did in fact make the said document. Without such evidence, the offence of forgery cannot be sustained.”
72. Further, in the case of; Francis Bwire Omada v Republic [2006] eKLR the Court of Appeal held that: -
- “The term forgery literally means making a false document with intent to defraud or deceive. A document is false if it tells a lie about itself. (See Baigumamu v. Uganda [1973] EA 26). In Words And Phrases Legally Defined, Vol.2 D-H page 273 it is stated that a document is false, among other things,
- “(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein.”
73. The main evidence that relates to this count was led by the forensic document examiner PW6 Corporal Martin Kitai. Upon examining documents marked A1-A5 being the cheques in question and the specimen handwriting marked B1-B4 obtained from the appellant, and the appellant’s known handwriting, he formed the opinion that, the questioned writing on all the five cheques were made by the appellant.
74. The witness has explained in depth how he conducted the forensic examination and the method used. There was no evidence adduced to rebut that evidence. Therefore, the subject cheques were made without authority and therefore generally forged. Therefore, the charges in count (2) well proved.
75. As regards count 3 I find that PW1 Kirimi testified that, the total amount not remitted to NSSF was Kshs 717,600. However, he did not give a tabulation thereof. PW5 Inspector Alphonse Liposhe who investigated the case, did not lead any evidence to support the figure of Kshs 1,340,000 stated in count (3) and neither did any other witness speak to it. The prosecution was duty bound to give a tabulation on how it arrived at that figure which was not done, therefore, the appellant must be given the benefit of doubt thereof.
76. However, before I pen off, I note as a matter of general observation that, the investigator herein suffered fatigue or just failed to devote time to this matter. I say so because had he done so, he would probably have charged the appellant with theft of each cheque in a separate charge or considered whether alteration of the issued cheque would amount to any other offence than stealing.
77. There is no doubt that the offences herein were committed over a period of time and it was required of the prosecution to avail more witness or evidence on all cheques drawn in favour of NSSF, who drew them, who collected them, where they ended and whether NSSF received them or not.
78. In conclusion I uphold conviction on count (1) and (2) and affirm the sentence imposed and quash the conviction on count (3) and set aside the sentence imposed by the court on count (3) and if any fine was paid it should be refunded to the appellant.
79. That is the finding of the court. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 28<sup>TH</sup> DAY OF JUNE 2024.**

**GRACE L. NZIOKA**



## **JUDGE**

In the presence of:

Mr. Ochieng for the appellant

Mr. Mutuma for the respondent

Ms. Ogutu: court Assistant

