

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 30 OF 2008**

**GEORGE BETHA..... 1ST APPELLANT
STONARD KAMWIMBI..... 2ND APPELLANT**

-AND-

THE REPUBLIC..... RESPONDENT

**From the Principal Resident Magistrate Court
sitting at Lilongwe. Being Criminal case no. 19 of
2008.**

CORAM: HON. CHINANGWA, J

Appellants, Present/Unrepresented
K. Banda, Counsel for Respondent
S. Mbewe, Court Reporter
Munyenymbe, Court Interpreter

JUDGMENT

The two appellants: George Betha and Stonard Kamwimbi, and another convict Evance Mtindo appeared before the Principal Resident Magistrate Court sitting at Lilongwe from 28th January to 5th February, 2008. It was on a charge containing 3 counts:

1st Count: Conspiracy to commit a felony contrary to section 405 of the penal code.

2nd count: Forgery contrary to section 357 of the penal code.

3rd count: Uttering a false document contrary to section 360 of the penal code.

They all pleaded not guilty. After full trial they were found guilty, convicted and sentenced as follows:

The 1st and 2nd appellants were each sentenced to 6, 36, and 12 months I.H.L. on 1st, 2nd, and 3rd counts respectively. The 3rd convict Evance Mtindo was sentenced to 480 hours community service.

The two appellants have presented a petition of appeal against conviction and sentence. The 1st appellant's grounds of appeal are as follows:

(a) *I was denied justice from the word go it took the police 4 days to take my statement and ten days to take me to the court of law.*

- (b) *My boss Mr Patel was in the court to tender his evidence on the case I was charged (the one brought in court had no idea whatsoever on the said deposit slips. The one that had been accepting them was not present in court).*
- (c) *I was denied bail and also to be represented by a prominent legal practitioner.*
- (d) *I was working for Deekay Suppliers as a truck driver and not a debtor collector; hence I had no idea of how the banking matter go by. If there was any mistake concerning the said deposit slips it could have been my bosses responsibility. But that never happened I am surprised.*
- (e) *On the list of the purported “Deekay Welfare Fund” my name was not there. Had it been that I am one (of) the beneficiaries would not my name be there?*

These are the grounds of appeal for the 2nd appellant:

- (a) *I am surprised to learn that I am charged with a forgery case. (All I*

know is that Mr Dyson whom the police refused to apprehend coaxed me to withdraw the money at NBS Bank using my driving licence a thing I did). A thing I never did.

- (b) *The complainant – Deeekay Suppliers denied me in court.*
- (c) *When I asked the NBS personnel represented in court to clarify my involvement in this case, he failed to answer my questions. All he said was that the document used when opening the said account was fake. How could a prominent bank like NBS accept fake documents in the first place, if that really happened.*
- (d) *I was denied justice in this case (it took 4 days for the police to get my statement and ten days to appear before the court of law).*
- (e) *I was denied bail and also a chance to be represented by a lawyer.*

- (f) *The way the case was handled was somehow tricky there were a lot of adjournments and within these times, I could see the magistrate, the prosecutor, the NBS and Deekay personnel smiling at each other.*

Before I proceed, I remind myself that I did not have the advantage, which the lower court had, of assessing the demeanour of witnesses. I further remind myself to bear in mind the provisions of section 5(1) of the Criminal Procedure & Evidence Code.

Facts show that the complainant Deekay Suppliers runs a business in Lilongwe. Mr Patel (Pw1) testified on behalf of the complainant. It is not in his testimony whether he is the appropriator or an employee.

Pw1 said that the 1st appellant was employed as a driver. He was also being detailed to deposit cheques issued by customers of complaint to the National Bank. The complainant has a bank account with this bank.

Whenever Pw1 sent 1st appellant to deposit cheques, the 1st appellant used to bring back deposit slips stamped Teller No. 8 of National Bank- city centre.

Later he received enquiry from New Building Society Bank (NBS) about the Deekay Suppliers Staff Welfare Fund account. He testified that the complainant did not open a Deekay Suppliers Staff Welfare Fund. Pw1 said that he was not aware about that fund. He also noted cheques which had an NBS stamp. He said that the complainant lost over K900,000 through this dubious account.

Pw2 Mr Mlombwa a manager at NBS city centre branch testified said that the 2nd appellant and 2 others opened an account in the name of Deekay Suppliers Staff Welfare Fund at his bank. On 21st January, 2008 the 2nd appellant wanted to withdraw K130,000. When Pw2 checked the account he observed that K280,000 was already withdrawn from it. He blocked further payments on this account because he was suspicious with transactions. He wanted to verify with NBS old town.

Pw3 – Mr Lipenga said that he is an NBS teller. He said that he called Mr Kanthiti to collect a cheque which had become stale. It was 3rd convict who came on behalf of Kanthiti to collect the cheque. The 3rd convict was arrested at the bank.

Pw4 – S Mwanza of National Bank city centre testified that there was no counter Teller No. 8 at their bank. He also said that no cheques of the complainant were deposited with their bank on 8, 10 and 17 January, 2008.

Pw5 – Mr Chilondola was in charge of police investigation. He tendered in evidence identity cards and driver's licence. The driver's licence belonged to 2nd appellant. The identity cards belonged to persons who were not employees of complainant. They were marked exp1. He tendered cheques deposited at NBS which were marked exp2, withdraw slip for K130,000 exp3, statements marked exp4, 5, and 6 for 1st, 2nd appellants and 3rd convict respectively.

The 1st appellant said that he deposited cheques with National Bank at the counter of teller no. 8. On another occasion he deposited cheques at the First Merchant Bank (FMB). The 1st appellant denied to have deposited cheques at the NBS. He categorically denied committing the offences.

The 2nd appellant said that he worked for Kalaria as a truck driver. On 8th January, 2008 he met Mr Dyson at a market. He helped him open a bank account with

NBS. He was given K5,000. Two weeks later he was asked to withdraw K280,000 which he did. He was given K5,000. After another two weeks he was asked to withdraw K130,000. This time he was arrested at the bank. He denied committing the offences.

The 3rd convict said that he was sent by one Kanthiti into the bank to meet Mrs Maloya to collect a letter. He was arrested in the bank. He denied being involved in the crime. This was evidence before the trial court.

I will proceed to deal with 1st appellant. The 1st appellant insisted that he deposited the cheques with National Bank teller no. 8. Evidence of Pw3 S. Mwanza said that there was no counter of teller no. 8 at their bank. The trial court found as a fact that 1st appellant actually deposited the cheques with NBS, not National Bank. I concur with that finding.

On the ground that he was denied bail, legal representation and unjustly tried. It is my view that it was upon the discretion of the trial court to or not grant bail. There is no basis to condemn it for having denied him bail. As for legal representation there is no record that 1st appellant indicated to the court of this

position. He has not disclosed the name of the so called prominent lawyer.

I would like to observe that if indeed there was truth of what the 1st appellant complained of. His so called prominent lawyer was at liberty to seek an order from the High Court to have access to his client (1st appellant). The said lawyer was also at liberty to represent 1st appellant in this appeal. I dismiss this ground as baseless.

The 2nd appellant admitted opening the account with NBS. He admitted withdrawing money amounting to K280,000 from the account. He contends that police failed to find Dyson. The trial found that it was on 2nd appellant to call Dyson not the State. I concur with this finding.

Appellants allege that the magistrate, prosecutor and witnesses showed conduct of familiarity in the course of hearing. This allegation is baseless as it is meant to win the sympathy of this court. I dismiss it. The convictions are upheld.

On sentences I find that they are proper. I would not interfere. They are upheld. In conclusion the appeal is dismissed in its entirety.

Pronounced in Open Court on this 11th day of June,
2008 at Lilongwe.

R.R. Chinangwa

JUDGE