

IN THE HIGH COURT OF MALAWI

**LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 132 OF 2008**

BETWEEN

**HACLEAN CHILONGO
& KEPHAS MWALUGHALI..... APPELLANTS**

AND

THE REPUBLIC RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA
: Unrepresented, Counsel for the Applicant
: Mr. Kaliaki, Counsel for the Respondent
: Mr. Njirayafa, Court Interpreter

JUDGMENT

Haclean Chilongo and Kephass Mwalughali appeared before the Principal Resident Magistrate Court where they were jointly charged with two others on three counts. They were charged with forgery contrary to Section 357 of the Penal Code on the first count, Uttering a false document contrary to section 360 of the Penal Code on the second count and attempted theft contrary to section 401 of the

Penal Code on the third count. They all pleaded not guilty to the charges. The two appellants were found guilty on all three counts. They were convicted and were each sentenced to five years imprisonment with hard labour on the forgery charge and on the uttering charge. They were each sentenced to 6 months imprisonment with hard labour on the third count. They appeal to this court against both convictions and sentences.

The particulars of the offences showed that the two appellants and two others on 29th March, 2008 at R.K. Hardware Shop in the City of Lilongwe with intent to defraud or deceive forged a negotiable instrument namely a cheque No. 0031000007237 by signing the said cheque for ROIC Hazardous Darts Club in the name of Silver Gray Foundation. They were alleged to have uttered the forged cheque to R.K. Hardware Shop in the City of Lilongwe, knowingly and fraudulently so. Having uttered the false document, they attempted to steal building materials worth K10,129,675.00 the property of R.K. Hardware Shop.

The facts of the case are that Haclean Chilongo had been a treasurer of a darts team called ROIC Hazards, to whose bank account he was a signatory. The bank account was with Ned Bank. In 2007, Haclean Chilongo, being the first appellant informed his team members that a cheque pad for their bank account had been stolen from him. The matter was reported to police. The bank account was closed.

In March 2008 a customer went to R.K. Hardware Shop in Lilongwe and obtained a quotation for building materials to be purchased for Silver Grey Foundation. The

quotation obtained was for building materials worth K10,129,675.00. There were telephonic communications between PW3, and employee of R.K. Hardware, and the people who called themselves as agents for Silver Grey Foundation. They invited PW3 to City Centre to collect the cheque for the building materials. When PW3 went to OPC to collect the cheque the agent said he was at Gemini House. PW3 began to doubt the lawfulness of the transaction. While at Gemini House the 2nd accused person arrived in a taxi with the 3rd accused person. PW3 doubted the authenticity of the cheque shown to him and he refused to take it. Later in the afternoon of that day the 2nd and 3rd accused persons delivered the cheque at R.K. Hardware and it was the owner of the shop who received it. The following day the shop owner went to the bank to confirm the authenticity of the cheque. Meanwhile the accused persons went to the shop and demanded to collect the construction materials. They also wanted commission. PW3 refused to give the materials. Meanwhile the police were alerted. It was James Eliya Nyirenda who presented the cheque to PW3. The bank informed the shop owner that the cheque was not authentic. The police arrested on Mtosa who led to the arrest of 2nd and 3rd accused persons who in turn led to the arrest of Haclean Chilongo as the source of the cheque. A search at house of Haclean Chilongo resulted in the recovery of 26 blank cheques from the same cheque pad as the one that was presented to R.K. Hardware with a view to obtain construction materials. The police also established that Kelvin Mwalughali got the cheque in question from Haclean Chilongo. Although Haclean Chilongo had alleged that the entire cheque pad had been stolen from him, the police were surprised that 26 leaves from the same pad were found in his house. The prosecution evidence was that all the accused persons were working in collaboration with each other and that the

cheque they presented to R.K. Hardware shop had been forged by them and was presented with a view to obtain the construction materials.

In his defense Haclean Chilongo stated that as Treasurer of ROIC Hazards Darts Team, he kept the cheque pads for the bank account of the Team. He said that one cheque pad was stolen from him. When the police went to his house on 30th March 2008, they handcuffed him and demanded for a cheque pad. He told them it was stolen. They searched his house and told him that they had found a cheque pad in his house from which the forged cheque came. He said that he never witnessed the search and he believed that the police investigators brought the cheque leaves into his house to implicate him. The police also asked him about Mwalughali. During cross-examination he said that a lot more items had been stolen from his house besides the cheque pad but he never reported the burglary to police, out of choice.

The defense story of Kephass Mwalughali was that Haclean Chilongo owed him K15,000.00. Haclean Chilongo then told him that he had a business deal which would enable him to raise the K15,000.00. He thus requested Kephass Mwalughali to assist in the transaction. He got the cheque in question from Haclean Chilongo and because he too had other matters to attend to at OPC, he engaged the services of others to deliver the cheque to R.K. Hardware. He was told they would both benefit from a commission on the business transaction.

According to the defense story of James Nyirenda and Emmanuel Sambo it was Mwalughali who sent them to get quotations from R.K. Hardware and who also gave them the cheque to deliver to R.K. Hardware shop.

Each one of the two appellants filed his own grounds of appeal. Haclean Chilongo filed four grounds of appeal. They can be summed up into two grounds of appeal namely that there was no or insufficient evidence to prove that he forged the cheque in question, uttered it and attempted to steal any cash and, secondly, that the search conducted at his house was improperly done as there was no search warrant.

Kephas Mwalughali filed eight grounds of appeal. The grounds can be summarized into three as follows:

Firstly that the lower court erred in law in not considering the evidence that he never presented the cheque and that he was not the one who obtained the quotation.

Secondly that the lower court erred in relying on inconsistent evidence of the prosecution witnesses and

Thirdly that the sentence was unduly harsh as it did not take into account mitigating factors and that co-accused were sentenced to 9 months Imprisonment with Hard Labour while he was sentenced to 5 years Imprisonment with Hard Labour.

The appellants chose to represent themselves. Their arguments on appeal followed their grounds of appeal and are essentially a repeat of what was said during hearing. The first appellant argued that there was no evidence of forgery against him for the cheque did not have his signature. He denied to have ever uttered the cheque and to have ever attempted to steal for when it happened he was not present. While conceding that he had been custodian of the cheque book from which the allegedly forged cheque came, he said that the cheque book had been stolen from him and that he had reported the matter to his boss who in turn went to close the relevant bank account. On the day the search was done at his house he had asked for a search warrant but it was not shown to him. He was slapped instead. He had been dragged out with his wife when the alleged search was done. He only heard the searchers announce that they had found some cheques but he did not see them. He believes the cheques were brought to his house by the searchers with a view to implicate him. He prays for the quashing of the conviction or for the reduction of the sentence.

The second appellant stated that the cheque in question had been given to him by the first appellant who had put it in an envelope. The police then went to the house of the first appellant. There they searched and found 9 blank cheques for Hazardous Club, for which the first appellant worked. He said that he had first been a messenger for first appellant just like James Nyirenda and Emmanuel Sambo. He was therefore surprised that he was sentenced to five years imprisonment with hard labour when the others were sentenced to only 9 months

imprisonment with hard labour. He said that at the time he received the envelope from the first appellant, he did not know that it contained a cheque.

It is trite that an appeal from the subordinate court to this court is by way of rehearing. This entails that this court is entitled to scrutinize the evidence and make its own findings which need not necessarily correspond with those of the lower court. Further, this court is entitled to set aside any findings of the lower court if it finds them not to be supported by the evidence.

There is no doubt on my mind that the cheque in question is not a true cheque. The evidence on record satisfies me that the cheque is a forged one. The first appellant who had been a signatory to the account as treasurer did not sign it. Neither did the other signatory of the account who testified in court. The signatures that appear on the cheque are not true signatures. They are false signatures rendering the cheque to be a forged document. The first appellant, Chilongo had custody of the cheque book from which the cheque in question was extracted. According to him the cheque book was stolen from his house during a burglary which he did not report to police, notwithstanding that many other valuable items were stolen from his house. He did report to the Chairman of the club for whose treasurer he was and for whose club he kept the cheque pad. Despite the said report the police found a number leaves from the allegedly stolen pad in the house of the first appellant during a search done at the time of arrest. The first appellant challenged the search as having not been authorized by search warrant and one that he did not witness. The appellant further speculated that the search party must have brought the cheque leaves with a view to implicate

him. Well, like the lower court I am unable to accept the defense statement of the first appellant. The way I understand the evidence on record is that the search in question was done in the course of effecting an arrest and that the police were entitled to conduct it to avoid undue delay. There would have been undue delay if the arrest was done and search postponed, to go and apply for search warrant. That would have defeated the ends of justice. Such kind of search is permitted under the Criminal Procedure and Evidence Code (See S24 of the CP & EC). The first appellant alleged that the police officers who said they found the cheques must have brought them, when coming to arrest him. That is mere speculation which lacks basis and is designed to deflect the cause of justice. This court can accept that speculation. I have examined the entire record and I find that the first appellant is the source of the cheque which was forged and that he was well aware of the processes it was taking even though he had earlier reported it missing. Indeed the second appellant who too was engaged in transacting in the cheque knew of the source and gave information that led to the first appellant. There is no doubt on my mind that the two appellants were fully aware and fully involved in the illegal transactions involving the forged cheque. Although they involved other persons, they closely monitored the process of uttering that cheque to R.K. Hardware and the attempt to obtain the construction materials. The evidence on record proves the charges against the two appellants beyond reasonable doubt. None of the grounds of appeal of the appellants are made out and none of those grounds is supported by the evidence on record. The appeal by both appellants on each of the charges is dismissed.

As to the appeal against sentences I think that the 6 years imprisonment with hard labour on the first and second count are excessive in all the circumstances. The fact that these were carefully planned crimes should have been balanced with the mitigating factors. As the lower court put it this was a botched deal by first offenders. The mitigating factors were never referred to in the sentencing by the lower court. I set aside the sentences on the first and second counts in respect of the two appellants. Instead I sentence each one of them to 36 months imprisonment with hard labour on the first count and also on the second count. I confirm the sentence of 6 months imprisonment with hard labour on the third count in respect of each of the two appellants.

This appeal succeeds to this limited extent.

PRONOUNCED in Open Court this 22nd day of December, 2008 at Lilongwe Registry.

R.R. Mzikamanda

J U D G E