

**IN THE HIGH COURT OF MALAWI**

**LILONGWE DISTRICT REGISTRY**

**CRIMINAL APPEAL NO. 28 OF 2007**

(Being Criminal Case No. 186 of 2006 in the  
Resident Magistrate court at Lilongwe)

BETWEEN

WILSON KANDEYA .....APPELLANT

AND

THE REPUBLIC .....RESPONDENT

**CORAM: HON. JUSTICE KAMANGA**

Tiwonge Kayira, Senior State Advocate

Nankhuni, counsel for the accused

Court Interpreter, F.H. Njirayfa

Court Reporter, I. S. Namagonya

## **JUDGMENT**

The appellant Wilson Kandeya appeared before the Senior Resident Magistrate where he was charged with two counts of theft and one count of forgery. He denied all charges. He was convicted after full trial and various sentences were meted. Being dissatisfied with the trial courts findings he appealed against both convictions and sentences.

### **The charges:**

There were various charges that were leveled against the appellant in the period between 26<sup>th</sup> May 2006 and 23<sup>rd</sup> October 2006. In the first charge sheet, the appellant was charged with the offences of theft of cheque pad contrary to section 278 of the Penal Code and Obtaining goods by false pretences contrary to section 319 of the Penal code. Then there is a substituted charge A where the appellant was now charged with first count of theft 2<sup>nd</sup> count of forgery and third count of conspiracy to commit a misdemeanour. Lastly there was once more an amended charge of 17<sup>th</sup> November 2006 where the appellant was charged with the offences of theft and conspiracy to commit a misdemeanour. At the closure of the prosecution's case the court substituted the counts of conspiracy to commit the felony contrary to section 404 of the Penal Code and conspiracy to commit a misdemeanor contrary to section 405 of the Penal Code for offences of forgery

contrary to section 357 of the Penal Code and theft contrary to section 278 of the Penal Code.

Hence the charges against the appellant were as follows: The first count was one of theft contrary to section 278 of the Penal Code. The particulars to this indicated that the appellant between the month of March and April 2006 at the City Centre in Lilongwe stole a cheque pad, the property of Ministry of Lands, Housing and Physical Planning and Surveys. The second charge is one of theft of ground units contrary to section 278 of the Penal Code. The particulars of this offence aver that the appellant between the months of March and April 2006 stole prepaid ground phone units from Malawi Telecommunications Limited at its Lilongwe Branch valued at Mk54,000.00. There is a last ground of forgery contrary to section 357 of the penal code. The particulars indicate that the appellant in the aforesaid period, with intent to defraud or deceive forged negotiable instruments, namely cheques numbers 000111 and 000113 by signing the said cheques in the names of Daniel Walter Mbale without the authority of the said Daniel Walter Mbale.

The appellant submitted seven grounds of appeal against the conviction. The grounds essentially indicate that there was no direct evidence that proved that it was the appellant that committed the alleged crimes. And as to the evidence, the trial court did not necessarily prove all elements of the two crimes, theft and forgery. Hence the convictions are improper. And if the crimes were indeed proved beyond reasonable doubt, then the sentences are manifestly excessive.

The state agrees that the elements of the two crimes were not supported by the evidence that was produced in court and that the convictions should therefore be quashed and the sentences should be set aside.

## THE LAW

Section 271 of the Penal Code defines the offence of theft in the following terms. “ *a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person then to general or special owner thereof anything capable of being stolen, is said to steal that thing.*

To prove the offence of theft, the following must be satisfied.

(a) *An intention to permanently deprive the general or special owner of the thing of it.*

The offence of forgery is defined as follows under section 351 “*Forgery is the making of a false document with intent to defraud or to deceive.*

Eight witnesses testified in the matter at hand. And the trial courts finding was based on circumstantial evidence. I will therefore deal with each offence as per the evidence that was in the trial court and the trial court's response.

I will start with the last charge forgery. The crucial witnesses that testified in regard to this particular charge were (Pw1) John Daniel , Walter Mbale, the Chief Accountant of the Ministry of Lands, Housing Physical Planning and Surveys and (Pw2) Oscar Masauko, Isaac Maliri, the Accounts Assistant in the same Ministry.

In his testimony Pw1 started that there was a cheque pad that was used to draw funds from an account that was funded by the Department for International Development (DFID) of the British High Commission. The account did not have any funds as funding had ceased. The appellant drew cheques from this cheque book payable to Malawi Telecommunications as consideration for ground phone units. Then he went to Lords Best Collections where he surrendered to them the cheque from the same cheque pad in consideration for three cell phones; there was a cheque payable to STARTEC for an amount of K44,550.00. Pw1 and Pw2 did not know the person that actually stole the cheque pad. In the evidence that was in court Pw1 indicated that much as there was a signature on the cheque that was supposed to be the representation of his signature, the same was not his signature. There was another witness Pw4 who testified that the appellant had approached him and had indicated that he had a cheque that he wanted Pw4 to use in buying some ground phones on the appellant's behalf, to wit Pw4 refused. It was also Pw4's evidence that then the appellant approached Pw3 and asked him

on the whereabouts of Pw4's friend Timothy. In the discussion, the appellant told Pw4 that he wanted the friend because the friend had been given a cheque to buy some units and his friend was nowhere to be found.

By definition of the crime of forgery, the elements that have to be proved beyond reasonable doubt include that it must be the person that is the suspect who must have done the act. In the matter at hand, Pw1 indicated that the letters, figures and signature on the cheques did not belong to him. The appellant also disputed that he did not make any endorsement on any cheques. In a criminal matter, where the standard of proof goes beyond one on balance of probabilities, there was need to establish the origin of the author who had written on the cheques. The normal practice is to invite the handwriting experts who determine the pattern of handwriting on the document in issue and then relate the same to the author. This is as was the case in **Republic vs Thole** criminal case No 1 of 1975. Where there is no handwriting expert, evidence of a witness who is acquainted with the alleged author's handwriting is usually allowed, as was the case in the case of **Nowa vs Republic** 11 ALR Mal 272. No witness was invited to determine authorship of the cheques. The issue thereby becomes, who authored the cheques. And can lack of introduction of the witness who can indicate the author be cured by section 4 and 5 of the Criminal Procedure and Evidence code. My observation on the same is that section 4 and 5 of the Criminal Procedure and Evidence Code can not cure this gap because it is a fundamental elements. The evidence on record therefore did not establish beyond reasonable proof that it

was the appellant and nobody else that authored the cheque. I therefore quash the conviction for the offence of forgery.

Then there is the issue of the theft of the ground units. The crucial witnesses for this offence were Pw3 and Pw4. The background being that the appellant was working at the Ministry where the cheque pad was lost and a cheque from this pad was used to buy units at Malawi Telecommunications Limited. Pw3's evidence was that he is a business man dealing in second hand clothes at the City Centre. He knew the appellant as he used to see him at the City Centre, but they never chatted. He used to see him at his office when he visited his customers. There is also a Thomas Maliri his nephew who used to stay with him but at the time that the matter was in court, Thomas was at large. In April 2006 Hastings Makuti came looking for Mr Thomas. This was during evening time. Thomas was not at home. On inquiring, Hastings Makuti told him that he had come to collect MTL units that Thomas had bought with the appellant. The following day, the appellant phoned Pw3 and asked him on the whereabouts of his nephew. When Pw3 asked the appellant on why he wanted his nephew, Pw3 told him that he had sent Pw3's nephew (Thomas) to get some units for him (for the appellant). Thomas disappeared from the scene. Pw3 phoned his brother in Blantyre and narrated the story. The brother told Pw3 that Thomas was in Blantyre with the brother.

Pw7 was Jimmy Mponela who stays in Blantyre at Machinjiri. He did not know the appellant. His testimony was that he knew Thomas Malinyero. And that Thomas was in the business of buying and selling different items including telephone units.

That because of the nature Thomas' business, Thomas sometimes transacted his business and lived in Lilongwe. It was Pw7's testimony that he has a telephone Bureau and at one time Thomas approached him as per his line of business and told him that he was selling units. Pw7 bought 4 cards and used 3 cards. Then a Mr Soko of MTL called him. As he was not clear on what was being said on the phone, he went to MTL office where Mr Soko told him that the cards that he had been using had been bought using a wrong cheque. Mr Soko was Pw6. He told the court that he works for MTL as an Assistant Accountant and is stationed in Blantyre. He is involved in reconciliation of accounts, among other duties. In May 2006, he received a returned cheque by the bank which had been received by Lilongwe Capital paypoint. The cheque was issued by the Land Policy Awareness (Ministry of Lands) for buying MTL cards. They checked with Ministry of Lands who had told them that the cheque was a stolen one. Pw6 used the MTL prepaid cards tracking system to find out who used the card. The system used shows the card number and the telephone number of the one using the card. It showed that it was Mr. Jimmy Mponela (Pw7) who used the card. Mr. Jimmy Mponela was called to the office and he came the same day. He admitted using the card. He also told them that he had bought it from Thomas. Pw5 was Mrs Flossy Kenani a cashier for MTL in Lilongwe. She told the court that on 25<sup>th</sup> April, 2006 she received a cheque from Ministry of Lands for K54,000.00. They were buying units. She gave them the cards. Later, the Blantyre office advised that the cheque had bounced. She checked with Ministry of Lands and Pw1 told her that the cheque used had been stolen. Pw4 was Hastings Makuti. In his testimony he told the court that he sells second hand clothes and the appellant was his customer. In April 2006, the appellant came to Pw4's place of business at City Centre. The appellant



had an envelope in his hands however the appellant did not open the envelope. He asked Pw4 if he could send the appellant to buy units to which Pw4 responded positively. The appellant then told him that he would have to use a cheque. Pw4 told the appellant that would be hard as Pw4 did not have an ID. To wit the appellant told him that it was not necessary since not everybody had an ID. Then the appellant told him that it was a government cheque. To wit Pw4 told the appellant that that would be difficult as he did not work for the government. It was his evidence that he did not see the cheque. Neither did he see what was in the envelope. He left the appellant, to sell his clothes to his customers. At that time his friend Thomas Malinyero was at the business place. When he came Thomas was nowhere to be seen. Sometime later the appellant approached Pw4. He wanted to know if Thomas was back. Pw4 asked him on where he had sent Thomas, to which the appellant replied that he had sent Thomas to buy units. The appellant left the place to chat with his friends and came back some time later. The appellant once more wanted to know if Thomas was back. Thomas was still elsewhere. The appellant went back to chat with his friends. Later the appellant came to inquire on whether Thomas has a cell phone. Pw4 gave the appellant Thomas's cellphone number. Pw4 and the appellant went to a bureau. They called the number, when the person at the other end asked on identity of the person that was calling, Pw4 told Thomas that it was him Hastings. Immediately Thomas cut off the line. More attempts to call Thomas proved futile. Pw4 offered to escort the appellant to Thomas' home in Area 23. As it was dark they boarded a minibus. When they got to a trading Centre the appellant told Pw4 that they could not go to Thomas' house at night but that Pw4 should tell Thomas that the goods he had bought he was to keep them safe. When Pw4 got to Thomas' house, Thomas was

not there, there was only William (Pw3). Later Thomas was in police custody for being found in possession of a fake cheque.

The appellant cross-examined Pw4 to wit Pw4 responded as follows. That this was the first time for the appellant to make an offer to Pw4 to buy units for him. That when they met and were discussing this issue, Thomas was available though he did not get the details of the conversation. Pw4 said that the appellant admitted to having sent Thomas to buy the units. On being asked whether he saw the appellant handing over the units, the Pw4 said no.

This was the crucial evidence with regard to the theft of the ground units. Counsel for the appellant referred to the observations that were made with regard to circumstantial evidence in the case of ***Jailosi vs Republic*** 1966-68 ALR Mal 494-497 that

*“it is the duty of the court in criminal cases to consider seriatim the entire hypotheses compatible with innocence to discover whether these have been negated by the prosecution and are incapable of explanation upon any reasonable hypothesis other than that of guilt before finding the accused guilty.”*

“Counsel for the appellant hence wondered why the trial court convicted the appellant when in his testimony he stated that he id not know why out of all the people working at Lands Hastings Makuti pointed at him.”

If one reads the evidence in the sequence order that he witnesses evidence is examined in this court, it becomes clear that out of the whole number of the people and despite there being no direct identification of the person that took the cheque from wherever it was, it was the appellant and nobody else who dealt with the cheque thereafter. The evidence of Pw4 shows that the appellant and nobody else approached Pw4 and made an offer to Pw4, for Pw4 to buy some units on the appellant’s behalf using government cheques. The discussion shows that the appellant knew that what he was proposing to the Pw4 was unlawful. Form Pw4’s testimony it is apparent that the appellant had the opportunity to meet Timothy. The appellant himself told Pw4 that he had given Timothy the cheques. The appellant told Timothy that he had told Timothy to buy some units. The appellant demonstrated anxiety when Timothy did not bring the units. And the Pw4 in the appellant’s presence phoned Timothy. When this is married with Pw5 evidence, she sold some units worth K54,000.00, using a cheque that later was found to have been stolen from Ministry of Lands. And Pw6’s evidence who traced the units that had been bought with the stolen cheque to Pw7 at Mkolokoti in Blantyre. And when Pw7 was asked about the units that he had used, he indicated that he got them from Thomas. These are the units whose serial number is in the group of units that were surrendered to a person by Pw5 who had surrendered to Pw5 a cheque that had disappeared from an office where the

appellant worked, the prosecution proves beyond reasonable doubt that it is the appellant and nobody else who used Timothy to buy cheques from MTL using the stolen cheques. The appeal conviction for the offence of theft of the MTL units is therefore dismissed.

As for the offence of theft of the cheque pad, one is left with no other conclusion than that it is the appellant and nobody else who took the cheque pad. One gets to this conclusion as per the analysis above. The appellant's grief against the trial courts finding with regard to the offence of theft of the cheque pad therefore equally fails.

#### **SENTENCES:**

The appellant is aggrieved with the sentence of 12 months for the theft of ground units and 18 months imprisonment for the offence of theft of cheque pad.

The maximum sentence for the offence of theft is five years imprisonment with hard labour. The appellant was a public officer who abused his office to commit the offence. Fortunately for him he was charged with the offences of simple theft. As a public servant he was to be charged with the more serious offence of theft by public servant. Counsel for the appellant argued that section 278 provides for the consideration of the circumstances of the theft. He observed that theft of the cheque pad is theft of a mere piece of paper that on the value of it is immaterial.

The case in point being ***PENDALL-DAY VS REPUBLIC*** 2 MLR @ 155. The case in point however indicates that the cheque is a mere piece of paper if it is not converted. However in the matter at hand this piece of paper was actually converted. The sentence of 18 months imprisonment is therefore not so excessive as to require that this court should interfere with it. I confirm the same.

There is the sentence of 12months for the theft of ground units. I equally find that the sentence is not manifestly excessive to necessitate that this court should interfere with it. I confirm the same. As for the sentence for the offence of forgery, the conviction is quashed the sentence is set aside.

Pronounced in open court this 4<sup>th</sup> day of March, 2008 at Lilongwe District Registry.

I.C. KAMANGA

**JUDGE**