

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 340 of 2003**

SIMON MWANGI KIHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Chief Magistrate’s Court at Kerugoya in Criminal Case Number 296 of 200

by J. N. Onyiego – R.M.)

J U D G M E N T

Simon Mwangi Kibara hereinafter referred to as the Appellant was tried and convicted by the Resident Magistrate Kerugoya on two counts of the offence of Stealing by clerk contrary to **Section 281** of the Penal Code. He was sentenced to serve 3 years imprisonment on each count. Being dissatisfied He has now brought this appeal against both conviction and sentence. In a nutshell his grounds of appeal are that there were no independent witnesses who testified against him nor were there any eye-witnesses but that the trial magistrate relied on documents and that his conviction was against the weight of the evidence adduced against him.

The particulars in respect of each charge against the Appellant alleged that being a store-clerk employed by Mwirua Farmers Co-operative Society, He stole assorted chemicals and farm inputs belonging to his employer. During the trial evidence was adduced that the Appellant was employed by Mwirua Farmers Co-operative Society as a store-clerk from 1st February 1985 to the year 2000.

At the request of the society Hesbon Mbuthia Kiura the Co-operative Officer based in Kerugoya conducted an audit check of the Society’s records and prepared a report which showed that the Appellant had collected certain chemicals and farm inputs which He signed for but that the items were not received at the Society’s sub-stores where they were supposed to be delivered.

The documents alleged to have been signed by the Appellant were forwarded to the document examiner together with the Appellant’s handwriting specimens and it was confirmed by the document examiner that the Appellant was the one who received the chemicals and farm in puts at the main store.

I have perused the original record of the lower court. I note that the report of the audit done by Hesbon Mbuthia Kiura which was produced as P Exh. 12 and the Delivery notes and stock cards produced as P Exhibit 1 to 11 did not form part of the record of appeal nor were they in the original file. This made it difficult for this court to form a conclusive impression on the evidence. I do not however think it would be fair or just to delay the conclusion of this appeal due to the absence of the documents. This is because it is apparent from the proceedings that the case against the Appellant was prosecuted mainly by one police constable Mwangi a person who was not competent in terms of **Section 85 (2)** of the Criminal Procedure Code. The Appellant’s trial was therefore a nullity and on this ground his conviction cannot stand.

Further the Appellant has virtually completed serving the sentence of 3 years imposed upon him and

even if the evidence against him was sufficient to support the charge, it would not be fair nor just to order a retrial.

I therefore allow this appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith.

Dated, signed and delivered this 11th day of July 2006.

H. M. OKWENGU

JUDGE