

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET.
APPELLATE SIDE

CRIMINAL APPEAL NO. 114 OF 2000

**(Being an appeal against the Judgment of the Principal Magistrate's Court in
Criminal Case No.208/98, by F.M. Kinyanjui (Esq.) Resident Magistrate,
delivered on 1st December 1999 in Kapsabet.)**

JOSEPHAT AMUTO MAKHATSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal arises from the conviction and sentence of Josphat Amuto Makhatsa, by the Resident Magistrate at Kapsabet on a charge of stealing by servant contrary to section 281 of the Penal code.

The particulars of the case in the subordinate court were that on an unknown date between October 1997 and January 1998, at C.I.T.C. centre Kapsabet in Nandi District of the Rift Valley Province, Makhatsa, jointly with others not before the court, being a servant of C.I.T.C centre, stole four hydrams, one hand pump, one folding table and Kshs.300/- in cash, which was the property of the said centre.

After a full trial in which the prosecution called three witnesses, Makhatsa whom I shall hereinafter refer to as the "appellant" was convicted as charged and sentenced to serve a year in probation.

He has now lodged this appeal, which is based on five grounds.

I have as expected of me I have had to re-evaluate the evidence on record with a view to establishing whether this appeal is meritorious.

It is on record that the court visited the site where the hydram that had been recovered from PW2, (who had claimed that he had purchased it from the appellant) and those that were manufactured by C.I.T.C were placed. It is also on record that the learned trial Magistrate noted that the recovered hydram though similar, was of a different model from those of C.I.T.C. It was therefore possible that the recovered hydram could have been made in another workshop, other than C.I.T.C's, a fact that would be supported by the evidence of PW2 who testified that he had made payments for the hydram at the appellant's home. At that juncture, the trial Magistrate should have found that there were serious doubts whether the recovered hydram was really the property of CITC and on that basis alone, the appellant was entitled to an acquittal.

The fact that he might have made hydrams at a place other than CITC, despite regulations that forbade this it, it cannot in my mind, be a ground for a conviction under Section 281. The centre should have explored other ways of disciplining him, as it should have been stipulated in its Terms and Conditions of Employment. I also find that there was no evidence relating to the theft of the other items.

I do therefore find that the ingredients of the offence were not proven beyond reasonable doubt and I do in the circumstances allow this appeal, quash the conviction and set aside the sentence. Dated and delivered at Eldoret this 26th day of May 2004.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:-