



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 51 OF 1997**

**BENJAMIN MITEMA ONCHIRI.....APPELLANT**

**versus**

**REPUBLIC .....RESPONDENT**

**(Appeal from the judgment and sentence of the Senior Principal**

**Magistrate's court at Nyeri, delivered by Njuguna**

**Kimani, Senior Resident**

**Magistrate, dated 19 th November, 1996, in**

**Criminal Case No. 2620 of 1992)**

**JUDGMENT**

The Appellant was charged in eleven counts each alleging the offence of making a document without authority contrary to section 357(a) of the Penal Code. He was an employee of Kenya Commercial Bank Nyeri Branch and particulars alleged that with intent to defraud, and without lawful authority or excuse the appellant made credit transfers of Kenya Commercial Bank for various amounts of money purporting to be a credit transfer made with the authority of various complainants on various dates.

There was count twelve where the Appellant was charged with stealing by clerk contrary to section 281 of the Penal Code. Particulars stated that on divers days between March 1990 and December 1990 in Nyeri Town in Nyeri District, being clerk to Kenya Commercial Bank Nyeri, the Appellant stole from the said Bank a total of Kshs.249,000. That was the total sum of money whose transfers the Appellant was alleged to have effected in counts one to eleven.

In his judgment the learned trial Magistrate talked of 15 counts but I have not been able to see that number of counts. The sentence related to counts 1 to 15. I have not been able to see those counts.

On each count the appellant was sentenced to four years imprisonment. The sentencing were ordered to run concurrently.

Grounds of appeal were 11 and Mrs. Mukuha, Counsel for the Appellant, argued them during the hearing of this appeal in which she raised a number of issues. State Counsel, M/s Ngalyuka, opposed the appeal maintaining that there was nothing wrong and that the appellant was properly convicted and sentenced.

I do not intend to go into details as I only need to point out that this was a good case the prosecution

could have easily handled successfully. But somehow case was not handled properly. I have said I have not been able to see the 15 counts the trial Magistrate was talking about. I have seen only 12. Yet the Magistrate convicted and sentenced the Appellant on 15 counts.

Each count ought to have proved beyond reasonable doubt. But neither the Prosecutor nor the trial Magistrate ensured that was done and as a result even in counts where the alleged complainant did not appear before the trial Magistrate to give evidence, the counts were taken to have been proved and the appellant convicted.

Then there was the issue of the evidence of the wife of the Appellant. She was to have been a witness but because she is a wife of the Appellant, she did not give evidence against the Appellant. Under the law the prosecution ought not to have counted on her evidence. But somehow, they still expected to call her as a witness. When she failed to give evidence therefore, that formed the basis of adverse comment by the learned trial magistrate in his judgment against the appellant.

Lastly, the last count, whether the counts were 12 or 15, was a count where the appellant was charged with the offence of stealing the sum total of the money alleged transferred as seen in counts 1 to 11, where the counts are 12, or counts 1 to 14 where the counts are 15. Lawfully therefore, the last count in each case should have been on alternative count and not one of the substantive counts. Since that count was not in the alternative, the charge was defective as the Appellant faced double jeopardy.

From the above therefore, I do hereby allow the appeal of the Appellant in its entirety. The conviction of the appellant on each Count, whether 12 or 15, is hereby quashed and the sentence imposed on each count set aside.

The Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 20th day of December, 2004.

**J. M. KHAMONI**

**Judge**