

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.479 OF 2000

**(From original conviction and sentence in Criminal
Case No.1502/98 of the Chief Magistrate's Court
at NAKURU – D. MOCHACHE (R.M.) JACKSON LIKALE
AURA.....APPELLANT**

VERSUS

REPUBLIC.....RESPONENT

J U D G M E N T

The Appellant has appealed against the conviction and sentence imposed against him by the C.M.'s Court in Nakuru. He was found guilty of a charge of STEALING BY AGENT contrary to Section 283 of the Penal Code and sentenced to a fine of 7000/- and in default 3 months imprisonment.

The Appellant submitted that he was the initial complainant in the case having complained that a sum of Kshs.26000/- had been misappropriated from the Mulembe Multipurpose Co-operative Society. That the matter later turned against him and he was charged of stealing 6000/-. He challenged the finding on grounds that no audit was carried out. He also submitted that those who complained against him had stolen a lot more money.

The Learned Counsel for the State supported the conviction. He submitted that in fact the Appellant was found collecting money from members of the public using fake receipts which it was alleged the Appellant had printed. That PW2 and PW3 were the ones who made the report to Police. That a trap was set and PW4, a police officer arrested the Appellant and recovered fake receipts from him.

I did peruse the record of the lower court. The evidence adduced before it was insufficient to sustain any conviction. There are several persons who were key witnesses who were never called to testify. PW4's evidence was that he arrested the Appellant after laying a trap in which they caught the Appellant issuing a fake receipt. The person used in the trap was not a witness. There was no evidence before the court satisfying the court under which circumstances the Appellant was arrested. The money allegedly given to the Appellant by this person was strangely not an exhibit in the case.

The Learned Counsel has submitted that receipts found with the Appellant were fake. In the case, PW3's evidence was that there existed two receipt books with same serial numbers but that one did not have the official stamp. It was PW3 who had given out receipt books to the Appellant. He also claimed that six people went to him claiming to have paid but whose names were missing in the register. That the corresponding receipt numbers held by the society had not been issued out.

The alleged six people were not witnesses in this case. They ought to have been called to provide evidence, if at all, that would link the Appellant to the alleged receipts.

Also strange is that the trial court on convicting the Appellant and passing sentence immediately ordered for the destruction of the receipt books that were exhibits in the case. That denied this court an opportunity to verify them as against the evidence before court.

Finally there was no proof of any forgery, PW3 who was the Treasurer of the Society and who gave out receipt books to its members had no training with which he could examine documents and determine whether or not they were forged. In any even, he did not give any explanation to show why he certified

the documents in issue as forgeries apart from saying a stamp was missing. A stamp can be missing for any reason including by reason of inadvertence by PW3 himself at the time he issued out the receipt books.

I also noted that the Appellant's defence was not considered. He explained where the 5,900/- he admits he collected went. He had laid a basis for that defence in his cross-examination of PW2. The defence was therefore not an afterthought. The court should have analysed it as against the prosecution case and particularly the evidence of PW2. It was in essence the Appellant's word as against that of PW2.

I do find that this conviction was unsafe and cannot be allowed to stand.

I accordingly quash the conviction, set aside the sentence. If the Appellant had paid any part of the fine, it should be refunded to him.

Orders accordingly.

Dated and delivered at Nakuru this 20th day of March, 2003.

JESSIE LESIIT

JUDGE