



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 132 OF 2001**

**HOSEA MURIGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from a judgment of the District Magistrate's  
Court at Kigumo, P. Mwangulu District Magistrate I,  
Dated 12 th March, 2001, in  
Criminal Case No. 29 of 2001)

**JUDGMENT**

The Appellant was charged with stealing by servant contrary to Section 281 of the Penal Code, it being alleged that on 17th day of October 2000 at Sabasaba town Maragua District, the Appellant being a servant to Charles Ndungu Mungai stole from the said Charles Ndungu Mungai Ksh.7550/= which came into the Appellant's possession by virtue of his employment.

Briefly, the prosecution's case was that during the morning of 17th October, 2000, P.W.1 Charles Ndungu Mungai gave his wife, P.W.2 Nancy Nyambura Kshs.7500/= with instructions to give the money to the Appellant, who was claimed to be their employee at Pork Butchery in Sabasaba town, to go and buy pigs from Igikiro and Wathiani. That was at their house as P.W.1, a teacher, went to teach at the school where he works. P.W.2 was doing business where Pork Butchery was and went with the money. Gave it to the Appellant adding Ksh.50/= fare in the presence of P.W.3 Joseph Ndirangu Muiruri, another employee of P.W.1.

The Appellant took the money and went but never returned to bring the pigs he went to buy. P.W.1 went to Kahumbu Chief's camp where he reported to P.W.4, Administration Police Jeremiah Lookelo who subsequently arrested the Appellant and took him to Sabasaba Police station before the Appellant was charged in the District magistrate's Court at Kagumo.

In his defence, the Appellant who, was arrested three months after the date it is alleged was given the money, told the court he had differed with P.W.1 on 16th October, 2000. He was not therefore working for P.W.1 on 17th October 2000 as he used to work at the butchery on casual basis. As a result he went to his home at Kangari and thereafter went to Wangige at Kabete where he was employed as a casual labourer and stayed there until 6th January, 2001 when he returned home because his father had been involved in a fatal accident which subsequently caused his death. The Appellant was at home during his father's burial when he was arrested on 17th January, 2001.

The court has not been told why the complainant, P.W.1, went to make a report to P.W.4 at the Chief's camp instead of reporting the matter to the police. It is not clear how P.W.4 managed to know the Appellant in order to arrest him without assistance from any other of the prosecution's witnesses. It is not clear why the police to whom P.W.4 claims to have handed the Appellant did not participate in the prosecution of this case clearly showing that there was no police investigation in the matter.

A case brought to court without police investigation having been done. P.W. 2 says her husband gave her Ksh.7500/= which she in turn gave to the Appellant plus Ksh.50/= fare to go and buy pigs at Igikiro and Wathiani. She says the money was in denominations of Ksh.1000/= notes for a total of Ksh.3000/= . The rest was in notes of Kshs.200/=, Shs.100/= and Sh500/= and was given in the presence of P.W.3.

P.W.3 on the other hand told the court he was present but saw notes of Ksh.1000/= and Ksh.100/= only. According to him, pigs were to be bought from Igikiro and Makuyu.

P.W. 4 received the report from P.W.1 on 16th January 2000 and arrested the Appellant on 17th January, 2000 a period of nine months before the offence was committed on 17th October 2000. Was it careless prosecution or poor recording of the evidence by Mr. Mwangulu the D.M.I, who heard the case?

There is undisputed evidence that the Appellant had worked for P.W.1 at least up to 16th October, 2000 the day the Appellant says they had disagreed. However, as this case was not investigated, when the Appellant says he had disagreed with P.W. on 16th October, 2000 and that therefore he did not go to work for P.W.1 on 17th October 2000 and that as a casual worker he was not therefore an employee of P.W.1 on 17th October, 2000, that could be true. When the Appellant says he was not given money to go and buy pigs as claimed by P.W.2 and P.W.3 that could be true.

In any case if he was not an employee of P.W.1 on 17th October, 2000, even if he was given the alleged money on that date, an important ingredient of the offence under Section 281 of the Penal Code disappears. The stealing must be done by a servant of the Complainant. Otherwise the charge fails. And as the Appellant is saying he was no longer working for the Complainant on that date and no credible evidence was adduced to disprove what he said, the case not even having been investigated by the police, what the Appellant is saying could be true.

From the foregoing therefore, the Appellant should have been given the benefit of the doubt, which I hereby do, and should not have been convicted.

Accordingly, the Appellant's appeal is hereby allowed. His conviction quashed and the sentence set aside. The Appellant be set at liberty forthwith unless lawfully detained in some other cause. Dated this 26th day of November, 2003.

**J. M. KHAMONI**

**JUDGE**