



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO 1242 OF 2001**

**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL**

**CASE NO 312 OF 2001 OF THE SP MAGISTRATE'S COURT AT**

**KIAMBU)**

**JOHN NZYIMI MBIVYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant was convicted of the offence of stealing by servant C/s 281 of the Penal Code and sentenced to three(3) years imprisonment. Being aggrieved by the said conviction and sentence, he lodged an appeal. Pending the hearing of this appeal he was released on bail.

At the hearing of the appeal and after the learned counsel for the appellant had made his submissions, the learned counsel for the Republic conceded the same.

As the first appellate court, I have re-evaluated the entire evidence on record. With respect, I entirely agree with both learned counsel that that evidence could not sustain a conviction.

The appellant who was employed as a salesman was alleged to have stolen beer worth Kshs. 37,591/50 in the course of his employment. The evidence relied upon by the learned trial magistrate was with respect, speculative. The fact that the complainant alleged there was a shortage when the sales were compared with the proceeds was crucial in the case. This called for all evidence to be scrutinized carefully and it was quite easy to do with mathematical precision considering the subject matter.

The appellant did not work alone. Two loaders were mentioned but were not called to give evidence. Two different documents were mentioned, delivery Notes and Beer certificate. No delivery Notes were produced. The certificate was not of much help as the signature were disputed and in any case there was no corroboration of the same.

It was alleged that the appellant admitted responsibility for the shortage and signed the delivery note acknowledging the same. No evidence to that effect was tendered.

In view of the foregoing, this appeal is allowed conviction quashed and sentence set aside. The terms upon which the appellant was released on bond pending the determination of this appeal are also vacated. Orders accordingly.

**Dated and delivered at Nairobi this 11th day of July 2002.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

