



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL 155 OF 2008**

**EVANS OMULI**

**ATSIBILWA.....APPELLANT**

**VERSUS**

**REPUBLIC**

**.....RESPONDENT**

***(From The original conviction and sentence in criminal case no. 901 of 2005 of the senior magistrate’s court at limuru)***

**JUDGMENT**

Appeal was filed by Evans Omuli Atsibilwa against the Republic. He has raised 10 grounds of appeal.

That appellant was charged with stealing by a person employed in the republic service contrary to section 280 of the penal code. He was tried convicted and sentence to suffer imprisonment for a period of three years. That was on 2/7/2007.

The grounds of petition are:

- 1) That the trial magistrate erred having ignored the fact that between 2000 and year 2002 the appellant had not been posted to Kikuyu Law Courts where the offence allegedly committed.
- 2) That the factual and material evidence produced was at variance with information outlined in the charge sheet rendering charge sheet defective.
- 3) That the trial magistrate disregarded the fact that when appellant was at the law court Kikuyu there was no handing over done.
- 4) That the sentence imposed is harsh and excessive considering appellant was 1<sup>st</sup> offender and then given the maximum 3 years sentence.
- 5) The trial magistrate erred in that he was not identified as the person who stole the said money which was stolen over a period of more than 2 years.
- 6) The trial magistrate accepted the plea even when fundamental constitutional rights had been violated by police by detaining appellants in custody for more than prescribed time and without questioning the police.

The prosecution case was that the appellant was employed in public service at Kikuyu law courts Kiambu district on divers dates between 15<sup>th</sup> July 2003 and 20<sup>th</sup> April 2005 as an accountant in judicial department he stole Kshs.3979, 522.50 the property of Government of Kenya which came to his possession by virtue of his employment.

The evidence was given by PW1 who was accountant attached to Kiambu Law Courts. She knew the accused person the appellant who does the same duties like herself PW1 wrote report and forwarded it to principal accounts controller and she was called to record statement. There are many exhibits. She was cross-examined at length.

Further evidence was adduced by PW2 from Kiambu District Treasury. He testified that on 28/9/2005 he went to Kikuyu Law Courts. They had discovered that surrendering of account books was becoming irregular. They went after one week. They asked appellant about the books he had not surrendered. PW2 found that the appellant was running requisition whereas he had not surrendered the earlier books given. There were 8 books on court fees missing and legal deposits, Miscellaneous Totaling Kshs.4, 966,319. The matter was reported to Accountant. The appellant admitted paying some money Kshs. 638,500/= he was not supposed to pay money directly using vouchers.

PW2 said he was aware that the appellant was charged with theft of Kshs. 3,979,522/50 and shortage was Kshs. 4,187,558.75 according to his findings.

PW3 was sworn Robert Ngechu Githui. He worked at Kikuyu for 3 years. He gave evidence on vouchers and receipts. PW4 gave evidence and came to the conclusion that the appellant had 7 complete receipt court fees books and another half way used, he had collected Kshs. 254,823 and had collected revenue with legal deposit receipts Kshs. 1,611,00/= and Kshs 27, 240/= and court fees Kshs.3,073,256/=. He had shortage of Kshs. 4,107, 558.25. The report was dated 18.5.2005.

PW2 was Humphrey Rugi Mwangi. He testified that he was assisting the appellant by collecting revenue and collecting cash. He demonstrated how he was working. He handed over money to the appellant every time. PW6 Rose Muraga Okundi also gave evidence. She worked at Kikuyu. She was collecting money and she demonstrates how she worked. The appellant said that he would bring shortage money and surrender it.

On cross-examination the appellant said he had no money in the bank. PW4 said they did not go to the bank to confirm if there was money in the bank.

PW 6 was clerical officer. She confirmed that she was given other work like dealing with traffic cases and giving receipts. She demonstrated how she received money and handed to the appellant.

PW3 Boniface Kinyua was clerk he was given work to receive money and issue receipts. All money received was given to the appellant.

In his judgment the trial magistrate found that the appellant was not surrendering the receipt books as is required before requesting for new ones. PW4 made report to District Accountant Kiambu. On 28<sup>th</sup> April 2005 PW4 and PW3 proceeded to Kikuyu Law courts to check. They found that there was a list of books that had not been surrendered where the appellant had made requisition for new ones. The unsurrendered books had collected Kshs. 4,966,319/=.

The appellant surrender vouchers for deposits of Kshs. 638,800/=.

PW1 was also involved she said they did a cash survey Kshs. 3, 071,530/= was not accounted for. Asked where the money was the appellant said he had used the money. There were no account books which were lost when the accused was in the station.

PW6 Rose said on several occasions appellant would ask her to assist him in preparing his duties and therefore other employees were handling money. Several witnesses testified and it is clear that the

appellant is the one who failed to explain what happened to the money amounting to Kshs.3, 979,522.50. The trial magistrate correctly found him guilty and convicted him for the offence as charged and sentenced him to 3 years imprisonment. I find that the prosecution proved its case beyond reasonable doubt and I find no reason to interfere with the judgment of the trial magistrate. The appeal is dismissed.

**Dated and delivered this 4<sup>th</sup> day of July 2012**

**J.N KHAMINWA  
JUDGE**