



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 607 OF 1996**

**(From Original Conviction and Sentence in Criminal Case No. 7725 of 1991  
of the Chief Magistrate's Court at Nairobi: U.P. Kidula (Mrs.))**

**ALFRIC KIPTOO BIRGEN.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Coram: Osiemo J.**

**Mr. Njeru - for the Appellant**

**Mrs. Shikuku - for the Respondent**

**Mr. Onduma - Court Clerk**

**JUDGMENT**

The appellant was charged with the offence of stealing by person employed in the Public Service contrary to Section 280 of the Penal Code. He was convicted and sentenced to 3 years imprisonment. His appeal to this court is against both conviction and sentence.

Briefly the facts of the prosecution case were as follows: The appellant was the Chief Executive of the TANA ATHI RIVER DEVELOPMENT AUTHORITY which I shall be referring as TARDA. In 1987 the financial position had degenerated and TARDA had financial hardship. The management resolved to start ways and means to start income generating projects. The appellant as the Chief Executive called a meeting comprising of the Heads of Departments to find out what steps to take. Various projects were suggested for approval.

The Engineering Department came up with a construction unit which was to construct projects for earning revenue for the Authority.

This unit was to construct buildings. This had the government blessing and approval. Among the projects undertaken were Masinga dam, Tannery project in Kitui and Emali, irrigation projects at Masinga and Tourist Lodge. Another project was a residential house for Mosong Limited. Mosong Limited company was owned by the appellant and his wife. That house which was at Kitengela cost the TARDA Shs.3.4 million to construct. That was the sum of the subject matter of the present charges against the appellant. All the money for materials and labour came from TARDA.

The facts are not in dispute.

The appellant in his defence had denied the charge and stated that after TARDA's construction unit had

gone into construction of buildings, it advertised itself and was looking for work. Mosong limited had a project to construct a house. It started negotiations with TARDA's construction unit. A letter of offer was written and there was acceptance. A contract was signed between Mr. Kiter on behalf of Mosong Limited and Professor Malo who was the Chairman of TARDA.

This was after the Board of Directors had approved the construction of a house for Mosong Limited at Kitengela. The construction was supervised by DW2, SIMON NGANGA who was Engineering Service Manager for TARDA. TARDA spent Sh.3.4 million to construct the house.

The Engineering Department of TARDA raised a bill of Sh.3.9 million and served it upon the appellant and demanded payment. This showed that TARDA had made a profit of sh.500,000/-.

The appellant upon receipt of the bill and demand note started to make payments immediately.

At the time of his arrest he had paid Sh.400,000/- and he made a further payment of Sh.260,000/-. After he had been arrested and charged with the offence of stealing the said sum which was spent to construct the said house at Kitengela for Mosong Limited which company he owned jointly with his wife.

As I have said earlier the facts are not disputed. TARDA entered into a contract with Mosong limited to construct a house for Mosong limited at Kitengela. The contract was signed by Professor Malo who was the Chairman of the TANA ATHI RIVER DEVELOPMENT AUTHORITY.

The total cost of the construction of the said house was Ksh.3.4 million. After the completion of the said house the appellant took possession. TARDA raised a bill of Sh.3.9 million and served it upon the appellant. The appellant on receipt of the said bill made arrangements and started paying immediately. By the time of his arrest he had paid Shs.600,000/-

As I have stated above, the facts are not disputed but the issue for consideration is whether the facts as stated do constitute a criminal offence under Section 280 of the Penal Code.

To answer the above I have to go back to Cap. 443, an Act of Parliament which created The Tana and Athi Rivers Development Authority Section 3 of the said Act provided as follows:

“There is hereby established an Authority which shall be a body corporate by the name of the Tana and Athi Rivers Development Authority, with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of:

***(a) Suing and being sued;***

***(b) Taking purchasing, or otherwise acquiring, holding. Charging and disposing of property, movable or immovable;***

***(c) Borrowing or lending money;***

***(d) Doing or performing all such other things or acts for the proper performance of its functions. Under this act which may lawfully be done or performed by a body corporate.***

Section 11 provides as follows:

The funds of the Authority shall consist of:

***(a) Such moneys as may from time to time be provided by Parliament for the purpose of the authority.***

***(b) Moneys borrowed by the Authority on such terms and for purposes as may be approved by the Minister; and***

***(c) Any moneys accruing to the Authority from any other source”.***

In the present case the management formed a committee to look into the possibilities of starting projects to earn the Authority some income to enable it to elevate its financial problems since the Government had stopped its.... and to it.

The Committee was chaired by DW1 ALBERT MUKURIA MUARIMI who was the Chief of Operations and Technical Services. The Committee came up with several projects. The proposals were forwarded to the Board of Directors for a approval and approval was granted. One of the approved projects was the construction of houses by the Engineering Department of the Authority. A contract was entered into between TARDA and MOSONG LTD to construct a residential house for MOSONG LTD at Kitengela. Mr. Kiter signed on behalf of MOSONG LTD while PROFESSOR MALO, the Chairman of TARDA signed on behalf of the Authority. Section 6 (2) of the Tana and Athi Rivers Development Authority Act Cap. 443 provides that all documents, other than those required by law to be under seal, and all decisions of the Authority, may be signed under the hand of the Chairman or, in the case of a decision taken at a meeting at which the Chairman was not present, under the hand of the person presiding at such meeting.

The Chairman acted within the frame work of the law as provides under the provisions of Tana and Athi rivers Development Authority Act Cap. 443.

The Learned trial magistrate made a finding that since the appellant was a direct beneficiary of the materials bought by the funds from TARDA and the labour provided by TARDA by indirectly being the one who released the money for the said purchase and labour by virtue of being the accounting officer, the appellant stole the said money which came into his possession by virtue of his employment.

With due respect to the learned trial magistrate this was a misdirection. The contract between TARDA and MOSONG LTD was legal, the construction of the residential house for MOSONG LTD was legal, and therefore the release of the funds by TARDA for the purpose of the constructing the said house was criminal.

At the completion of the said residential house for MOSONG LTD, the appellant took possession TARDA raised a bill of Sh. 3.9 million and served it upon the appellant. This meant that the project had earned TARDA revenue to the tune of Sh.500,000/-

The appellant, upon receipt of the bill, made arrangements and started paying immediately. He had paid Sh.600,000/- before he was arrested and arraigned in court.

Counsel for the appellant argued that this was purely a civil matter and if there was any failure to remit the payments, the complainant could have sought civil remedy for breach of the contract as there was no criminal element in the whole transaction.

I agree with him, this was purely a civil matter. The court is even told that the complainant had constituted a civil suit in which he sought payment of the contractual amount. This was the most appropriate course. All in all for the above stated reasons, I find there was no criminal offence committed by the appellant and therefore it would be unsafe to allow the conviction against the appellant to stand. I allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant by the trial magistrate.

I order that the appellant be set at liberty forthwith unless held for any other lawful cause.

**Dated, delivered and signed at Nairobi this 29th day of July, 1998**

**J.L.A. OSIEMO**

**JUDGE**

