



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 48 of 1994

HARRY AMWAYI ETEMESI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mango J) dated 15th January, 1994

IN

H.C.CR.A. NO. 209 OF 1993)

JUDGMENT OF THE COURT

The appellant, a cashier with the Kenya Breweries Ltd. At Kisumu, was convicted, after a trial before a magistrate's court, of ten of the charged twelve counts of theft by servant contrary to section 281 of the Penal Code and was, thereafter, sentenced to concurrent terms of 9 months imprisonment. His first appeal to the superior court was dismissed and this is his second appeal.

The prosecution case as presented before the trial court and as rehashed by the superior court, was that the appellant received, in the course of his employment as a cashier, varying and clearly ascertainable sums of money each day between 1st July and 15th July, 1992, but which he could neither produce when it was required nor account for.

The appellant while admitting that he had received the money which was complained about, and that on the day a surprise audit of the money was done he could not account for the money, contended, on the main, that he was denied the opportunity of reconciling his accounts to ascertain how the shortage which was discovered during the audit arose. That contention was the main thrust of submissions by his counsel, Mr. Siganga, before us and is the crux of this appeal. Mr. Siganga's submission before us was as follows: the appellant was doing more work than he could reasonably handle and that was clearly admitted by his immediate superior officer; he received varying sums of money daily on account of his employer but that there was no clear instructions as to how regularly he was required to bank the same; that in the absence of such instructions no adverse inference could properly be drawn against him as both courts below did; that at the time of the surprise audit he was not given any opportunity to take his bearings with the result that he was unable, at short notice, to account for the money he had admittedly received on behalf of his

employer; that had he been given the opportunity which he specifically requested for after the audit he would possibly have ascertained how the shortage occurred and since later on some money respecting one of the floats he was in charge of was discovered in a carton lying on a money safe, which money was partly counted in his absence, there was the possibility that had he been given the opportunity he sought he would have recovered more money in the office; that there was also, the possibility that since he was not present when the money was recovered more money in the office; that there was also, the possibility that since he was not present when the money was recovered it may have been tampered with. To appreciate the above submissions we consider it essential to set out, in summary, the background facts.

On 10th August, 1992, Frederick Muhoho Njoroge (P.W.1), who was the Credit Manager, Kenya Breweries Ltd but who was then based at Nairobi, went to the Kisumu branch of the company to conduct a spot check of the money in the appellant's custody. Njoroge conducted the check in the presence of the appellant. The appellant, at Njoroge's request, produced all the money he said he had in cash, which Njoroge counted in the appellant's presence and asked him to verify the correctness thereof which the appellant did. He also produced, on request, the banking in slips and other documents to show the banking and disbursements he had done and made. The appellant produced the banking receipts which showed that the last banking was done on 1st July, 1992. So the audit was mainly confined to the period of 1st July, 1992 to the date when the audit was done, namely 10th August, 1992, and concerned three floats or categories of money the appellant received. They were the petty cash, sundry receipts, and the tembo float which was money held for payment to company employees. When the audit was completed only the petty cash float did not have any discrepancy.

Njoroge's testimony was that the appellant was given an opportunity to produce all the money in his custody, he produced whatever money he had but could neither explain the whereabouts of some of it nor give an account as to how it had been disbursed, if at all. The witness concluded his evidence in chief as follows:-

"I told accused to close the office and to verify my findings. He also confirmed the actual cash I counted with him. The following day somebody else was delegated for the job."

Under cross-examination the witness stated that the appellant requested to be given an opportunity to reconcile his accounts but the request was refused. The explanation the witness gave was that it would be futile to reconcile the accounts in absence of the money.

The appellant was suspended from duty on 10th August, 1992, but there is evidence on record to show that he was called back to the office, on 12th August, 1992, when some more money was allegedly recovered inside a carton which was lying on top of the safe in which the appellant kept or was supposed to keep all the money he received in the course of his employment. The appellant was called to witness the counting of that money. He however, arrived when the counting had partially been done. The evidence is also clear that he was not present when the money was recovered.

This is a clear case. As was rightly pointed out by Mr. Ogoti, State Counsel, there is no dispute that the appellant received the money complained of. There is no dispute he did not bank any money after 1st July 1992. The appellant, as the cashier of the Kenya Breweries Ltd., Kisumu branch, owned the company a duty to account for all the money he received on its behalf. The appellant was on 10th August, 1992, asked to account for all the money he was shown to have received on account of his employer but he failed so to do. A rebuttable presumption was thereby raised that he had stolen the money. The onus was on him to rebut that presumption. He could do so, either by producing the money, or by showing how it had been applied, if at all, for the benefit of the employer. He was given the opportunity to do so, on 10th August, 1992, but failed to do so. We agree with Mr. Ogoti, that at that point the offenses charged were established.

Heavy weather has been made on the recovery of some money on top of the safe stashed in a carton. According to the explanation by the appellant the money was in respect of the tembo float. The trial magistrate and the first appellate court did not think the recovery of the money in anyway carried the

appellant's defence any further except with regard to the two counts respecting which he was acquitted. It was the concurrent findings of fact by both counts below that the appellant had a duty to account to his employer for the money but that he failed so to do. This being a second appeal we cannot interfere with that finding.

Moreover, money was not recovered in the safe where it was supposed to be. It was in a carton which was found on the money safe. It was not small amount of money. Although it was still in the premises of the appellant's employer, as owner thereof, the appellant did not disclose that fact to Njoroge who demanded to be shown the money with the other cash. The employer had provided a safe for keeping the money. There was no explanation offered by the appellant as to why it became necessary to keep the money in a carton outside instead of inside the safe. His counsel attempted to indirectly explain the position by suggesting that because it was conceded that the appellant was overburdened with work he could possibly have put the money there but forgot he had done so. In effect what counsel was trying to do is to show that at best the appellant was only negligent which is not a criminal act. That suggestion smacks of heresy and is far-fetched. The amount of money involved was in excess of Kshs.300,000/=. On 10th August, 1992, when the audit was conducted the appellant was prompted to produce all the money which he had but failed to produce the money in question. The fact that it was kept at a place less secure than inside the safe which was provided to the appellant is also telling about the appellant's intention. He had already converted it to his own use. It was immaterial that it was still in the owner's premises and inside the appellant's office. There was asportation, however limited, which clearly showed the appellant had the necessary animus furandi.

In the old English case of R v. Poynton (1862) 7 L.T 434, the accused was a letter carrier. It was his duty to deliver letters sorted to him for that purpose and if from any cause he was unable to deliver them, to bring them back to the post office in his pouch. The accused did not deliver a letter containing money which had been given to him for purposes of delivery. Nor did he return it to the post office on completion of his round; but on being asked for it soon afterwards, he produced it from his pocket and gave a false excuse for not having delivered it. It was held that there was sufficient taking to constitute the crime of stealing.

In the present case it was the appellant who removed that money out of the safe and placed it in a carton on top of the safe. He had exclusive use of the office, or so we think. Only him knew of the presence of the money in the carton. Yet when he was asked to produce all the money in his possession he did not produce it. As at that time the money can be said to have been beyond the reach of the appellant's employer because it depended on the appellant to either produce it or to state where the money was or to show how it had been applied for its benefit. It is in cases like the present one that section 268 (2)(e) of the Penal Code was intended to cover.

In the above circumstances we are satisfied that the appellant was properly convicted in all the ten counts and the authorities his counsel cited in no way assist him in this matter. His appeal fails and is dismissed.

Dated and delivered at Kisumu this 13th day of March, 1997.

R.O. KWACH

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR