

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1209 OF 1993

DANSON METHU KIBEBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 6248 of 1990 of the Chief Magistrate's Court at Nairobi: E B Achieng Esq)

JUDGMENT

The appellant, Danson Methu Kibebe, was convicted after trial by the learned Chief Magistrate, Nairobi of the offence of stealing contrary to section 275 of the Penal Code. He was alleged in the particulars of the charge to have stolen Shs 888,282/50 between the 28th of October, 1986 and 14th day of August, 1987, the property of Geoffrey Muthogo Kamachiri. Upon his conviction, he was sentenced to serve 6 months imprisonment. His appeal to this Court is against conviction and sentence.

There is no dispute on the facts that both the appellant and the complainant were initially business partners in the firm known as Equatorial Office Supplies which was dealing in among other things the supply of stationery and equipment to various government departments including the Ministry of Works, Supplies Department. This firm was initially formed by the complainant and duly registered with him as the sole proprietor. When the business was declining, he invited the appellant to join him as a partner in the said firm so as to boost its operations. This was in June, 1981. Thereafter the business picked up and the partners entered into various transactions with Jimba Credit Finance for credit facilities which enabled the firm to secure a big supply to the tune of Shs 3.69 million or thereabouts with the Government of Kenya, Ministry of Works, Supplies Department. As time went on, the partnership could not meet their financial obligations to Jimba Credit Finance Co which was pressing for payment and yet the Government who was the principal debtor had not paid them for the supplies made. This forced him to sue the Government through the office of the Attorney – General. Before all these debts and liabilities were settled, the complainant withdrew from the partnership. This was on the 4th of August, 1986 vide a Notice of Cessation No 83441 (Ex 1) duly signed by both the appellant and the complainant according to the document examiner. Thereafter the appellant registered the same business afresh in the same name with him as the sole proprietor. The suit filed against the Government duly determined in favour of the firm on the 9th of September, 1986 and subsequently the firm was paid the amount claimed which the appellant through his lawyers used to settle the claim against the firm by Jimba Credit Finance. The firm was eventually paid the balance of Shs 1.3M. The complainant claimed a share of this money saying that as he had been a partner in the firm, he was entitled to 50% share of the money, but the appellant contended that he was no longer entitled to any such money as he had ceased to be a partner in the firm. In any case, it was his contention that they had agreed before the complainant pulled out of the partnership that should the appellant succeed in his efforts to recover the sum of Shs 3.69 million from the Government he would himself get 75% of the money due to his personal efforts in the matter while the complainant would only get 25%. Later the complainant withdrew from the partnership and the appellant contended that he lost his 25% entitlement to the money as agreed. The complaint that was made against the appellant was that he had stolen the sum of Shs 888,282/50 to which the complainant was entitled to in the original partnership out of the proceeds paid to the firm by the Government through the High Court action filed by the firm.

It is manifestly clear to me that the complainant's claim against the appellant is the sum of Shs 888,282/50 was in the nature of a civil claim which ought to have been pursued in the civil Court.

Learned state counsel is also of the view that this was a civil claim. Indeed I am informed that the complainant has since filed a civil claim against the appellant in HCCC No 6032/93 although the details of the case were not stated during the hearing of this appeal. The dispute that was before the Court below was basically centered on the disagreement between the appellant and the complainant who were formerly conducting business as partners and later disagreed on how to share profits and liabilities.

On proper consideration of the evidence adduced by the appellant and his witnesses, I am satisfied that the charge as laid against him was not proved beyond reasonable doubt. I am satisfied that the alleged theft was not proved as the appellant adduced evidence showing that he was entitled to that money.

For reasons given, I allow this appeal. I quash the conviction of the appellant and set aside the sentence that was imposed. I order that he shall be set free and be released forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 26th day of July 1994.

S.O.OGUK

JUDGE