



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Criminal Appeal 25 of 1995**

**DANIEL KARIUKI MWAURA .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(appeal from an order of summary dismissal of the High Court of Kenya at Eldoret (Mr. Justice S. K. Aganyanya) dated 15<sup>th</sup> September, 1993**

**IN**

**CRIMINAL APPEAL NO. 111 OF 1993)**

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**JUDGMENT OF THE COURT**

The appellant Daniel Kariuki Mwaura appeals to this court against summary rejection of the appeal filed against conviction and sentence in respect of the offence of stealing by a servant employed in the Public Service contrary to Section 280 of the Penal Code. He was sentenced to four (4) years imprisonment.

Amongst the grounds of appeal he had presented before the superior court he had stated:

"the learned magistrate failed to evaluate properly the handing over evidence in respect of the facts of harassing and intimidation of the appellant by P. W. 111 and his officers and the non-availability of the Miscellaneous receipt books."

That was his first ground of appeal.

In his ground of appeal before the superior court the appellant stated that the trial magistrate had erred in law and in fact is not holding that the hostility between him (the appellant) and P. W. 111 Nicholas Kipchumba Mberia prevented the appellant from handing over (the moneys) in a proper manner.

His third ground of appeal is against severity of sentence. Section 352 (2) of the Criminal procedure Code (under which the superior court summarily rejected the appeal) limits the power of summary rejection to cases where the appeal is brought on the ground that the convictions were against the weight of the evidence or that the sentence was excessive. See Okang vs Republic (1982-88) 1 K. A. R. 277.

In this case the appellant's petition raised in the first two grounds some issues which could not be

summarily rejected. He complained of failure on the part of the trial magistrate to correctly evaluate the evidence and also the existing hostility between him and Mr. Mberia which impeded the process of handing over. These grounds, at least, raise some issues for arguments on appeal and we think the learned judge was wrong in summarily rejecting the appeal.

This court however has powers of the superior court as per Section 3 (2) of the Appellate Jurisdiction Act (Cap 9) and we see no reason to remit the appeal to the superior court for hearing when we can ourselves decide on the merits of the appeal. We proceed to do so now.

Mr. Gachomba urged that the issues of evaluation of evidence and non-availability of relevant miscellaneous books could have resulted in the appeal in the superior court being allowed.

It is not in dispute that the appellant had in his possession a sum of shs. 297,500/= which had to be deposited with the District Treasury for payment of services rendered to the Ministry of Health. The appellant stated that he moved the sum in question (money) from one strong room to another and kept the keys to the other strongroom to make sure the money was safe. The money was in an envelope, he said. All this happened after he was ordered to hand over the charge of his office to Mr. Nyongesa, his deputy. The appellant was in possession of the money from 27<sup>th</sup> April, 1991.

The appellant stated that he paid out this sum to the cashier on or about 17<sup>th</sup> May, 1991 but got no receipt for it. We find it impossible (as did the learned trial magistrate) to believe that he paid the sum to the cashier. The appellant had been in Government Service since 1977 and he knew of the procedures involved in repayments or refunds of monies.

We are satisfied that the appellant's alleged problems (hostility) with Mr. Mberia have nothing to do with the money in question. That story is a red herring.

The cashier denied ever having received the money. His deputy (the cashier's) also denied receiving the money.

The trial magistrate accepted evidence of non-payment of money by the appellant. We do not find any cause to think otherwise. What the appellant did amounts to theft and he was correctly convicted.

In the result the appeal by the appellant to the High Court is dismissed both on conviction and sentence.

Dated and delivered at Nakuru this 29<sup>th</sup> day of September, 1995.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this a true copy of the original.

**DEPUTY REGISTRAR**