IN THE COURT OF APPEAL

AT KISUMU

(Coram: Masime, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 120 OF 1991

Between

MARY WESONGA .....APPELLANT

ANDE

REPUBLIC.....RESPONDENT

(Appeal from a Judgement of the High Court of Kenya at Kakamega (Osiemo J) dated 24/10/90

in

HCCR Appeal No 149 of 1990)

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JUDGMENT

On 29th January, 1990 the Resident Magistrate's Court at Busia convicted Mary Wesonga, the appellant, on two counts of stealing by a person employed in the public service contrary to section 280 of the Penal Code. She was on the same date discharged under section 35(1) of the Penal Code on condition that she commits no offence for a period of 12 months from the date of sentence. The trial magistrate's notes on sentence do not, however, indicate to which count this conditional discharge was related. Her appeal against conviction and sentence to the High Court at Kakamega was on 24th October, 1990 dismissed. She now appeals to this Court against that dismissal; her chief complaint being that there was no theft of the money in respect of which she was charged.

When the two charges reflected in the two counts mentioned above were preferred against the appellant, the prosecution set out to prove that she had stolen the money stated therein which was the property of the Republic of Kenya that had come to her possession by virtue of her employment. To do this, it had to show that she had the intent to permanently deprive the Republic of Kenya of that money or that she had fraudulently converted it to her own use. Direct or circumstantial evidence was therefore necessary in this regard.

Section 268(1) of the Penal Code is in the following terms:

> "268 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

Clearly from the foregoing, fraudulent intent is a specific ingredient of the offence of stealing.

At the material time, the appellant was an employee of the Cotton Lint and Seed Marketing Board, (the Board,) and was stationed at the latter's Busia office. Amongst her duties was to pay cotton farmers from whom the Board had purchased cotton.

On 29th January, 1988 the appellant's accounts were checked by John Ambasa Obae (PWI), an auditor with the Board. These accounts showed that on 15th April, 1987 she had a shortage of Kshs, 3660/= and that on 15th September, 1987 she had a shortage of Kshs 10,645/=. The appellant acknowledged these two shortages, which subsequently formed the basis of the two counts of stealing, referred to above.

Apart from the foregoing acknowledgement, there appears to have been no other credible evidence that she stole the money mentioned above. Indeed, her conviction on the two counts of stealing by the trial court was founded on this acknowledgement. Likewise, in dismissing her first appeal, the Superior Court relied on the same. In this regard, the first appellate Judge had this to say:

> " The appellant does not deny that she could not account for the above stated sums but she claims that the same were shortages and not thefts. I have re-evaluated the evidence on record as I am entitled to do. I agree that a normal shortage is not theft but the sums involved cannot be said to be mere and normal shortages in the course of duty. The evidence against the appellant was overwhelming and I see no reason to interfere with the finding of the trial magistrate."

Credible direct or circumstantial evidence to the effect that the appellant stole the money reflected in the two counts of stealing referred to above was lacking. It is therefore uncertain how the first Appellate Judge came to the conclusion that the shortages reflected in the ppellant's accounts as are set out above were not mere and normal shortages in the course of duty. Indeed, it is unclear to us what overwhelming evidence there was against the appellant that militated against interference with the trial magistrate's finding by the first Appellate Court. It is not enough for a first Appellate Court to merely say that it has re-evaluated the evidence before the trial Court as was the case in the present appeal. That re- evaluation and the necessary findings of fact in respect thereof must appear on the record of that Court. It is only then that an observation such as was made by the first Appellate Judge that the evidence against the appellant was overwhelming would become apparent.

In the instant appeal, there was a clear absence of any attempt to prove fraudulent intent on the part of the appellant. This being a specific ingredient of the offence with which the appellant was charged in the two counts mentioned above, its absence was fatal to her conviction on the said counts.

Learned state counsel, Mr Karanja, quite rightly therefore conceded this appeal at the outset.

Accordingly, we allow the appellant's appeal, quash the conviction and set aside the sentence.

It is so ordered.

Dated and delivered at Kisumu this 4th day of December, 1992

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR