



REPUBLIC OF KENYA

**Midika v Republic**

**Court of Appeal, at Nairobi January 18, 1985**

**Kneller, Nyarangi JJA & Platt Ag JA**

**Criminal Appeal No 96 of 1983**

**(Appeal from the High Court at Nairobi, Sachdeva and Porter JJ)**

**January 18, 1985, Kneller, Nyarangi JJA & Platt Ag JA delivered the following Judgment.**

On January 20, 1983 Mathews Onyango Midika, the appellant, was convicted of stealing by an agent contrary to section 283(b) to the Penal Code and sentenced to four years imprisonment by the senior resident magistrate, Kisumu.

His appeals against the conviction and the sentence were dismissed by the High court (Sachdeva and Porter JJ) in Nairobi on August 10, 1983.

He appealed against that decision but his advocate, Mr Orenge, abandoned the appeal against his sentence because on a second appeal this court could not interfere with it (section 361(1) Criminal Procedure Code (cap 75)).

So his appeal was against that decision of the High Court in its appellate jurisdiction and therefore confined to matters of law (section 361(a) (ibid)).

The particulars of the amended charge were that on divers days between January 12 1982 at Kisumu Municipality within the Kisumu District of the Nyanza Province, being an office bearer of the Kenya Union of Sugar Plantation Workers, the National Secretary General, he stole Kshs 210,000, the property of the Union which had been entrusted to him by the Union's Miwani Branch as its Harambee contribution to the Nyando constituency Secondary Schools.

The case for the Republic was that the appellant held that office in the union during that period and was the current Member of Parliament for Nyando Constituency. The union's branch at Miwani is in Winam Constituency and its Member of Parliament was Mr Anyumba.

The appellant arranged for His Excellency the Vice-President to be the guest of honour for the Nyando Constituency Harambee on January 16, 1982. Winam Constituency's harambee for its secondary and primary schools was to follow on March 3, 1982.

The Nyando Constituency harambee was for its secondary schools. The people in its locations were collecting for it and various local companies had contributed to it by the end of 1981.

The appellant went outside his constituency on or before January 4, 1982 to the union's workers at Miwani Sugar Mills and asked them to hand him Kshs 211,300 for his harambee and they told their

union's branch officials to arrange this with the Mills' management authorizing it to deduct their contributions from their wages in reasonable amounts each month later because they were trying to pay school fees for their children who had done CPE. The branch chairman and secretary wrote a letter to the personnel manager of the mills in this vein.

At first the mills' management agreed to pay the union Kshs 211,300 by cheque and recover that sum proportionately from the members it employed in five monthly instalments from June to October inclusive. Then it refused to do so because Anyumba and the District Commissioner thought half should be paid over to Anyumba because the management and workers were his constituents.

The chairman and secretary of the Miwani branch signed a letter to their personnel manager on January 8 telling him to issue the mills' cheque for the union to them as agreed and if Anyumba wanted money for his constituency's harambee he, too, should visit their members at the mill and discuss this with them as he had in the past.

Meanwhile, he should collect from those who were not union members and the general public in his constituency. They signed another letter of January 11 in almost the same terms to the District Commissioner, Kisumu. Both letters refer to the appellant as the general secretary of the union and the friend of the Miwani branch members. The mills' cheque was handed to Ngige on January 11.

So it came about that on January 12, 1982 the Mills' Bank of Baroda cheque for Kshs 211,300 made out to the (parent) union, specially cleared, was credited to the current account of the Union's Miwani branch at Barclays Bank, Kisumu, and Kshs 210,000 drawn by the appellant, James Onyango Nyagima, a trustee of the union and Francis Odeny Ngige, its Treasurer, by a cheque they signed for cash. (Notice that Kshs 1,300 remained in that current account). Nyagima and Ngige left that cash with the appellant.

And it was on the same day, January 11, His Excellency The President directed that harambee meetings and collections should be suspended until further order so that parents could, instead, pay their children's school fees, and that any money already collected should be deposited in a bank account or with the local District Commissioner to earn interest.

The appellant learnt of this from an assistant chief of Kabar sub-location on January 12 and read all about it in the press the next day. The ban was raised at the end of June.

An undated unsigned typed letter to the Minister of Constitutional Affairs copied to His Excellency the President from "All Workers, Miwani Sugar" was sent on September 21 to the Provincial Commissioner, Nyanza and passed to the Provincial Labour Officer with a copy to the District Commissioner, Kisumu for them to investigate very urgently, but thoroughly, the allegations in it against the appellant.

The allegations are that their wages were docked of sums for harambee contributions to the appellant's constituency development fund without their written consent which was illegal under the Trade Unions Act and it was never used for developing anything anywhere but, instead, to undermine the government. He had collected another Kshs 750,000 from other factories which also never reached any self-help project. He had asked the mills' management to dismiss any worker who queried the deduction.

The appellant, as general secretary, signed a letter from the union on September 27 to the Minister for Labour giving him fourteen days notice of a strike of the union members at Miwani Sugar Factory because one thousand of them had not been housed or paid house allowance in accordance with rulings of the Industrial Court in 1975 and 1981.

The Provincial Labour Officer wrote on September 25 to the Managing Director of the mills telling him not to deduct any sums from the union's members because the Kshs 211,300 the mills had paid the union had not reached the Nyando Development Fund or been traced and to make sure that, in future, no deductions should be made without their consent.

This was copied to the Provincial CID and on October 15 I P Lutubula began investigating what had

happened to that money. He discovered, in short, it had not been paid into the appellants' own bank account or the one he and his wife used together. It had not been deposited with the District Commissioner or repaid to the Mills. The Nyando Constituency secondary schools had not had it and the union members did not know where it was. None of it was found in his town house in Nairobi or country home at Nyahokobe Miwani.

The appellant told him at Miwani on October 15 that he had spent it all after June 30 between harambee meetings at Taveta, Murang'a and places in the Western Province. He could not specify the amounts or recall the dates for these events. He asked for time to go to Nairobi and get the same amount from Kshs 600,000 loan the Credit Finance institution was due to give him. I P Lutubula detained him.

The next day at 11.30 am in the Provincial CID office Kisumu in answer to S P Arap Kikwei's inquiry and caution the appellant claimed the mills' workers agreed to give him their money for his many harambees in 1982. This Kshs 210,000 was for the one on January 16. It did not take place so he decided to keep it in a place only he knew of until His Excellency the Vice-President came to take part in it when he would produce it all.

The explanation did nothing to dispel the fog swirling round that Kshs 210,000 as far as I P Lutubula was concerned so he arrested the appellant and charged him with this offence.

C I P Kaminda recharged him on October 17 and cautioned him but he said he was unwell in body and mind and wished to see his doctor before he made any statement.

C I P Kaminda took Dr Adongo to him at the Railway Police Station where he had been returned and found a letter in Dholuo written by the appellant under a book near a pen beside him. The appellant tried to snatch it back but only tore off a portion which he destroyed. Corporal Rono of the CID translated it into English.

The appellant asks the reader of it to tell Odera to arrange for Amayo to go with the appellant's children and see that old man because it was vital that the money should all be found before the appellant goes to court. Kasera can trace Okiki by telephoning 794460 which is Okiki's house number. Seline should be with them in the house at home here or .....

The corporal and other policemen went the appellant's house in Woodley Estate, Nairobi and searched it but they found no trace of Kshs 210,000. Seline was there and she is the appellant's wife. Kasera is a friend of the appellant's family and he was found in the Nairobi offices of Special Branch.

The appellant pleaded not guilty on October 18 to the charge in the court of the senior resident magistrate.

When he was put on his defence on January 4, 1983 he chose to make an unsworn statement. He asserted that this money was given to him as a gift by the Mills' Union members because he was the general secretary of the union and their dear friend.

Harambees were forbidden between January 11 and July 1 so he kept it in his safe from the greedy grasp of the Kisumu District Commissioner and Peter Anyumba. The Nyando Constituency Harambee meeting would probably have been graced by His Excellency the Vice-President in December 1982 but the appellant was detained by the CID ostensibly for calling and cancelling a strike at the Mills.

S P Arap Kikwei had recorded his inquiry statement but I P Lutubula had decided to arrest and charge him. It was then that he said :

“Supporting the workers at Miwani had decided that this money [should] be contributed to Western Province, Taita, Othaya or anywhere [else] in the Republic would you go and arrest MPs of those areas?”

C I P Kaminda had recharged and cautioned him but he wanted to see his doctor first.

The story of his asking for pen and paper to write to the doctor was untrue. A patient never writes to a doctor due to see him. It was to his relatives to collect the fees for his advocate.

The Kshs 210,000 was, therefore, he said his and he could use it for what he wished to use it for (maybe entertaining the Vice-President and his entourage) but it had never been given to him by the union members to hand over on their behalf at the harambee for the secondary schools in his constituency on January 16.

His advocate then produced Kshs 210,000 in Kshs 100 notes to the senior resident magistrate. The appellant wanted it back from the court because he wished to hand it over with the other sums he had collected at the harambee whenever it took place. The notes were the ones he had been handed on January 11 by the Union Trustee and Treasurer in or outside Barclays Bank in Kisumu.

The trustee, Nyagima, and the treasurer, Ngige, were his co-accused. They made unsown Statements. Nyagima said that money was given by the workers not for the appellant's own affairs but to add to the appellant's own contribution to the harambee when the guest of honour came which he was sure he would do.

The defence witnesses were the 1982 training manager of the mills, two labourers, a carpenter, two shop-stewards and a tractor driver employed by the mills. The last six were union members.

The training manager swore the deductions were being made by the mills because its management lent the Union Kshs 211,300 for the Nyando Harambee Development Fund and not the appellant. Its cheque was made out to the Union and not the appellant.

The others maintained the workers wanted their money to go to the appellant as a gift.

Some went so far as to say the appellant could use it to pay the dowry for another wife or buy a car. Others were sure it was to increase the appellant's own contributions at harambees he attended and others thought the appellant was given it for his constituency harambees and yet others believed the appellant would use it at that January 16 harambee meeting to collect funds for the secondary schools in his own constituency.

None of them had any complaint to make about the appellant's use or nonuse of it and would never complain if he had misused it.

The magistrate and the judges for cogent reasons believed the witnesses for the republic (and the training manager) and not the appellant, his co-accused and the union members who were defence witnesses. The magistrate saw and heard all those people in his court which is a distinct advantage in deciding which are credible. The judges meticulously weighed the recorded evidence. We find they were correct in their assessment.

The concurrent findings of fact of these two courts, in effect, were that the appellant could not account for the Kshs 210,000 which he had been handed to present at the harambee on January 16 to the guest of honour as the combined donations of the Miwani branch Union workers for the secondary schools in the appellant's constituency and the sum he handed to the magistrate was not what he had been entrusted with at Kisumu on January 11 at the bank. We have not been persuaded we should disturb those findings of fact.

There can be no reasonable doubt the Union's Kshs 210,000 was entrusted to the appellant to deliver for the union's branch at Miwani to the guest of honour at that harambee for the purpose of the harambee. He was its agent.

He could not do so because the harambee did not take place. He did not follow the directive of the President. He did not return it to the Union. He did not go back to the Mills's union workers for directions.

It was money and he could not at first return it. He paid the equivalent into court but not the same money. He had fraudulently converted it. See section 268 Penal Code (cap 63).

The courts below were entitled to and right to accept as true IP Lutubula's testimony that the appellant said he had spent this sum on harambees elsewhere since July 1, 1982 and reject the appellant's denials that he blurted that out. Likewise, it was open to them and we think they were right to reject the six defence witnesses' evidence this was a personal gift to the appellant. It may have been typical union brotherly solidarity but it was against all the other believable evidence. The appellant's explanation for the whereabouts of the Kshs 210,000 between January 11 and October 15 was repelled as false and was, therefore, not a reasonable explanation.

It was suggested to this court that cash and other forms of property are given by their owners to add to politicians' own donations, which we doubt, and that it is acceptable for the politicians to pocket them or part of them for their own or other purposes especially if the harambee does not take place.

We do not accept this. It is not allowable under the law. It is the crime of stealing by an agent. No one would contribute to harambees or other good causes otherwise.

The appeal is dismissed.