



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: Law, Miller and Potter JJA)**

**CRIMINAL APPEAL NO 85 OF 1981**

**BETWEEN**

**JOHN MUIRURI KAGUNYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead J) dated 12th June, 1981 in Criminal Appeal No.565 of 1980)**

**JUDGMENT OF THE COURT**

The appellant and another man Muhanji were jointly charged with stealing by servant Kshs 30,000 from the Kenya Commercial Bank at Eldoret, contrary to section 281 of the Penal Code, by a Resident Magistrate at Eldoret. They were both convicted and sentenced to thirty months imprisonment. They appealed separately to the High Court. Muhanji's appeal was successful, but that of the appellant was dismissed. Represented by Mr Kibunja the appellant has brought a second appeal to this Court.

The facts of this case are unusual.

The appellant was a "cash officer" employed by the Bank and Muhanji and another man called Wamai were employed there as cashiers. They were subordinate to the appellant. On September 3, 1980 the appellant took Kshs 10,000 from Muhanji's bank-cash against the "security" of a personal cheque. Later on that day the appellant certified that Muhanji's cash balance was correct although it was short by Kshs 10,000. On September 4, Wamai handed to the appellant, at the latter's request, Kshs 20,000 in cash against the "security" of a personal cheque. Later that day, when Wamai's cash was due to be checked, he asked the appellant to return the Kshs 20,000 which the appellant had taken from him earlier. The appellant took Kshs 20,000 from Muhanji's bank cash, handed it to Wamai and retrieved his "security". Muhanji's cash was now Kshs 30,000 short, yet on September 4, the appellant again certified Muhanji's cash balance as correct.

On September 5, Muhanji called upon the appellant to replace the Kshs 30,000 which he had paid to the appellant on September 3 and 4. The appellant must have used that Kshs 30,000 because in order to replace the shortage he went to Mr Odhiambo, the Bank's accountant, with a requisition for Kshs 30,000 to be given to Muhanji. Mr Odhiambo withdrew Kshs 30,000 from the Bank's reserve and handed it to the appellant who passed it on to Muhanji. As a result of all this, Wamai's cash account balanced, as did

Muhanji's, but the bank's reserve account was short by Kshs 30,000, a shortage which was discovered by Mr Odhiambo and the Chief Cashier on September 8.

The trial magistrate held that the money which was stolen was the Kshs 30,000 taken from the reserve on September 5. The learned first appellate judge thought otherwise. He held that the money stolen from the Bank was the two sums of Kshs 10,000 and Kshs 20,000 taken by the appellant from Muhanji, and which, in the trial magistrate's words, "disappeared miraculously". We doubt if any miracle was involved, but we agree with the learned judge that those two sums of Kshs 10,000 and Kshs 20,000 represent the money actually stolen from the bank, and not the Kshs 30,000 removed from the reserve, which found its way into Muhanji's bank cash and was not therefore the money actually stolen.

We would have thought that in the light of these proved facts, the appellant's guilt was amply demonstrated. He obtained Kshs 10,000 from Wamai, replaced it with Kshs 10,000 which he obtained from Muhanji; then he obtained another Kshs 20,000 from Muhanji and another Kshs 50,000 from the bank reserve with which he replaced the Kshs 30,000 obtained from Muhanji.

The appellant has thus received Kshs 60,000 of bank money and can only account for Kshs 30,000 of it. The irresistible inference is that he stole the balance.

Mr Kibunja submitted that Wamai was an accomplice. Neither court below thought so, and nor do we. Mr Kibunja submitted that the money taken from Wamai and Muhanji was not stolen, as these two men were special owners of the money and parted with it freely against security. We see no merit in this. The appellant was charged with stealing from the general owner (the bank) and not from the special owners (the cashiers). It was open to the prosecution to lay the charge in this way. Mr Kibunja submitted that as, on the Judge's finding, the money was stolen when it was handed over by Muhanji, the special owner, it was not stolen from the bank. We do not agree with this submission. When goods belong to a general owner and are stolen from a special owner, such as a bailee, either the general or special owner can be named as complainant in the charge. Stealing consists of taking anything "fraudulently and without claim of right (section 268(1) of the Penal Code). Even if the appellant was intending to use the money merely as a loan, as Mr Kibunja submitted, an intention to repay money which has been fraudulently taken does not prevent the money from being stolen, see section 268(2)(e) of the Penal Code and Rep v Jones [1976] KLR 1.

We have no doubt that the appellant's conduct was fraudulent throughout, as was demonstrated by his false certification of Muhanji's bank-cash balances. We think he was properly charged with stealing the bank's money and not that of a special owner and we have no doubt at all that he was properly convicted.

We order that this appeal be dismissed.

**Delivered at Nairobi this 2nd day of April, 1982.**

**EJE Law**

**Judge of Appeal**

**CHE Miller**

**Judge of Appeal**

**KD Potter**

**Judge of Appeal**