



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CRIMINAL APPEAL NO 99 OF 1981**

**BETWEEN**

**VINCENT SIMIYU NYONGESA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead J) dated 28th February, 1981 in Criminal Appeal No.588 of 1980)**

**JUDGMENT OF THE COURT**

This appellant, an employee of the Kenya Co-operative Creameries, was charged in the Resident Magistrate's Court at Kitale with four counts of stealing, in each case a single milk can said to be worth Kshs 750, belonging to four separate creameries, contrary to section 275 of the Penal Code. He was also charged, in the alternative with dishonestly handling the four milk cans, knowing or having reason to believe them to have been stolen or unlawfully obtained, contrary to section 322(2) of the Penal Code. After a long and careful trial he was acquitted of the four counts of stealing but convicted on the alternative count and sentenced to the mandatory minimum sentence of seven years imprisonment, to be followed by five years police supervision. He appealed to the High Court, but his appeal was summarily rejected.

The facts present no difficulty. The cans were stolen from the KCC's depot on May 31, 1980 and were found at the appellant's house six days later. This recent possession was sufficient to raise a strong presumption that the appellant was the thief. The Resident Magistrate preferred to accept the evidence of prosecution witnesses who said that because of security precautions at the depot it was unlikely that the appellant was the actual thief and that other persons must have taken the cans. That may as well be so, but it does not exclude the probability that the appellant instigated those persons, whoever they may have been, to steal the cans, in which case the appellant was a principal offender in the offence of stealing and guilty of that offence. In other words, the evidence was equally consistent with the appellant being the thief as with being a guilty receiver. In this connection, we refer to the case of *Kipsaina v R* [1975] EA 253 and to the following extract from the judgment of the Court in that case – "The evidence in this case does not point to the blanket having been dishonestly received rather than stolen and the appellant's conviction on the alternative charge of handling was prejudicial to him, as it involved the consequence of receiving a sentence quite disproportionate to the offence of ... stealing which he is just as likely to have committed."

This proposition could also be stated in this way. When an accused person is charged with alternative counts of stealing and dishonest handling, then unless the evidence is such as to exclude the reasonable possibility that he is the thief, he should be convicted of stealing and not of handling. That seems to us to be the position in the instant case. The reasonable possibility that the appellant was the thief, or a principal offender in the theft, has not been excluded and he should not have been convicted of handling. For these reasons we allow this appeal to this limited extent. We quash the conviction of handling, contrary to section 322(2) of the Penal Code and set aside the sentence of seven years imprisonment and five years police supervision passed on him. We substitute convictions for stealing, on the first four counts charged against him, contrary to section 275 of the Penal Code.

As regards sentence, the appellant is a first offender, but the offences are serious, because the appellant was in a position of trust and probably suborned junior employees to do the actual stealing on his behalf. We sentence him to two years imprisonment on each of the four counts of which he now stands convicted, the sentences to run concurrently.

**Delivered at Nairobi this 25th day of March, 1982.**

**E J E LAW**

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**JUDGE OF APPEAL**

**C H E MILLER**

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**JUDGE OF APPEAL**

**K D POTTER**

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**JUDGE OF APPEAL**