



**REPUBLIC OF KENYA**

**HIGH COURT APPELLATE SIDE NAIROBI**

**CRIMINAL APPEAL NO 277 OF 1979**

**JOSEPH GITONGA GITHONGO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against sentence by TTM Aswani Esq in the Senior Resident Magistrate's Court, Nyeri  
Criminal Case No 1037 of 1978)***

**JUDGMENT**

The appellant, who was at the material time a clerk in the judicial department at Nyeri was convicted by the Senior Resident Magistrate there of stealing by a person employed in the public service, contrary to section 280 of the Penal Code, and placed on probation for two years.

The charge related to a sum of Shs 1555/60 and the date on which the offence is said to have taken place was amended at the end of the prosecution case from "on or about 5th October 1978" to "between 5th and 12th October 1978".

This is of some importance because it was the prosecution's case throughout that the appellant was responsible for a deficiency of cash to the amount stated, and had either held the cheque (exhibit 5) for the amount back, or at least had failed to see that it was properly signed for in the register (exhibit 5) or the appropriate receipt endorsed on the reverse in order to cover up that deficiency.

While it can be said that there was some evidence that the appellant was at some stage in possession of the cheque (see the evidence of Mrs King'ori, who gave it to him along with the register and a money order; and of Macharia, the executive assistant who handed over effectively on 10th October to Mwarimbo, who said that the appellant had the keys to the safe in the revenue office from which the cheques, including exhibit 5, were taken, and incorporated this in his handing-over notes) there is no evidence that he stole that cheque. Although it was not signed for in the register by the appellant, as the succeeding money orders were, it was nevertheless produced and eventually paid into the bank by Mwarimbo on 12th October 1978 (see the paying-in book). Even if there had been evidence to support that conclusion it would not have availed the prosecution because the charge sheet specified "cash of Shs 1555/60".

The case *Menzour Ahmed s/o Sheikh Saleh Mohamed v R* [1957] EA 386 was different. It was concerned with the reverse situation, in which the Court of Appeal rejected a submission that "the sum of Shs 3000" in the particulars of the charge did not include a cheque for that amount, both on authority and on the definition in section 5 of the Penal Code. However, in that case the Court of Appeal said (at page 388):

Although the appellant received credit for the amount of the cheque, he did not convert it into

money by cashing it, and no money, as distinct from the cheque itself, ever came into his possession. There must be an actual receipt of money before there can be a conversion of it: *R v Keena* 11 Cox CC 123.

In the instant case the prosecution were meticulous in tracing the origin of the cheque. They showed that the sum originated in an application for a warrant of arrest in execution of a decree in Senior Resident Magistrate Civil Case 182 of 1977 of Nyeri, for Shs 2327, the file of which was produced as exhibit 2. After the addition of court fees and interest and the deduction of money paid, the sum recovered under the warrant and paid into the Resident Magistrate's Civil Registry in Nairobi was Shs 1586/ 70. After Shs 31/10 collection fees had been deducted they forwarded a voucher (exhibit 3) and the cheque in question (5) to the Nyeri Court.

Hence it came into the inward mail registry at Nyeri and, as we have seen, into the hands of the appellant at some stage.

Unfortunately, the prosecution were nothing like as meticulous in showing the deficiency of the money and (if they had shown that) the appellant alone (and we stress the word "alone") was responsible for it. It was left to the defence to secure the production, through Mwarimbo, of the receipt books forming what we think (although the record as to this is far from clear) to be defence exhibits 2 to 5 and the paying-in books. But even these (although most, if not all, of the receipts appear to be singled by the appellant) do not establish the deficiency. It is not enough to say (as Mwarimbo did) that, had the cheque (exhibit 5) not been included, the total of the cheques paid in on 12th October would have been only Shs 4685/90, and then relate that back and say there must inevitably have been a deficiency in the cash. That does not follow.

For these reasons we are far from satisfied that the prosecution proved beyond reasonable doubt that there was a loss of money, or that the appellant stole it; and we therefore agree with the State Counsel that this conviction cannot be sustained. Undoubtedly, there were irregularities over the cheque for which "the appellant was responsible; the gap in the appellant's signatures in the Register on 5th October and his failure to receipt (as it was put) the back of the cheque. These factors may give rise to a suspicion against the appellant; but fall far short of certainty.

We accordingly allow the appeal, quash the conviction and set aside the order of probation passed on the appellant.

*Appeal allowed.*

**Dated and delivered at Nairobi this 29th October 1979.**

**E. TREVELYAN**

**JUDGE.**

**A.R.W HANCOX**

**JUDGE.**