**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENTA TA NAIROBI**

**CRIMINAL (REVISION ) CASE 75 OF 1978**

**REPUBLIC.....APPELLANT**

**AND**

**BENJAMIN OGWENO KOYIER.....RESPONDENT**

**JUDGMENT**

The respondent was charged before the Senior Resident Magistrate, Nairobi, with theft by a person employed in the public service, contrary to section 280 of the Penal Code. The particulars of the charge were as follows:

> On diverse days between 31st October 1977 and 30th January 1978 at Nairobi, within the Nairobi area, being a person employed in the public service as an accounts assistant in the Judicial Department in the office of the Attorney-General, [he] stole cash Kenya Shs 26,450 the property of the Kenya Government which came to his possession by virtue of his employment.

The respondent was originally charged before the Chief Magistrate on 4th February 1978 on twenty separate counts totalling Shs 26,450 but, on 22nd February 1978, a charge sheet with the above-quoted particulars was substituted before the Senior Resident Magistrate, and the respondent pleaded guilty to it.

The court prosecutor then outlined the facts. The respondent was employed in the Judicial Department and was attached to the High Court in Nairobi as an accounts assistant. His duties included receipt of cash on behalf of the department, preparing bank pay-in slips and banking cash with the Central Bank of Kenya. The respondent was not entitled to cash his personal cheques from the department but, on his own initiative and without approval of any authorised officer, he cashed twenty of his own cheques, drawn on an account in Kisumu, from the moneys collected by him, totalling Shs 26,450. However, he wrote those cheques in such a manner with technical errors in them that they were all dishonoured upon presentment and, in event, he did not have sufficient funds in his account to meet any of those cheques. His bank in Kisumu became suspicious when it found that a large number of cheques which were not being met were passing through his account, and it notified the Registrar of the High Court in Nairobi. The matter was then reported to the police and, after investigations, the respondent was charged. Mr Onyango, who appeared for the respondent, accepted the facts as correct on behalf of the respondent whereupon the magistrate found him guilty on his own plea and convicted him.

The respondent was a first offender and he had refunded Shs 1500 to the Registrar of the High Court. Mr Onyango applied for thirty days to see if the respondent could refund the balance of the stolen amount. The magistrate granted an adjournment to 23rd March 1978. A number of further adjournments were granted after that, and finally on 10th May 1978 Mr Onyango informed the magistrate that the respondent

had been unable to raise any money, except for Shs 1500. That would appear to be reference to the Shs 1500 which the respondent had already refunded. Mr Onyango then spoke in mitigation on behalf of the respondent, stating, in effect, that he was a first offender, was extremely sorry for the offence, was losing thirteen years of service, had two wives, nine children and an old man (presumably his father) to support, and had a kidney problem, suffering from "cimatsisis", and was obtaining medical attention.

The magistrate noted that the respondent was a first offender, had pleaded guilty, was ready to pay the money, the sum involved was fairly large and that attempt should be made to have it recovered and that, taking into account all submissions of his counsel, the respondent would be given an option of a fine with emphasis on compensation. He then fined the respondent Shs 30,000 or six months' imprisonment in default, and ordered that if the fine was paid, a sum of Shs 26,450 out of it to be given as compensation to the Court.

Against that sentence an application for review has been made by the Attorney General on the ground that the sentence was manifestly inadequate. Consequently, a notice to show cause why the sentence should not be enhanced was issued upon the respondent. Mr Rao, the assistant deputy Public Prosecutor for the Republic, drew my attention to the number of adjournments which the respondent had been granted and submitted that the "emphasis on compensation" was completely uncalled for in the circumstances of the case. No enquiry whether the respondent was in a position to pay any amount of fine was conducted, and the net result was that the respondent received only an effective sentence of six months' imprisonment, which was manifestly inadequate. Mr Onyango Otieno for the respondent argued, in effect, that the magistrate had properly taken all the mitigating circumstances into consideration, including the respondent's ill-health, that the respondent should be given a chance to do some work and earn for his family, and that the sentence imposed by the magistrate should not be disturbed.

Before I deal with the considerations regarding the adequacy or inadequacy of the sentence imposed upon the respondent, there can be no doubt that it was improper. The respondent was arrested on 30th January 1978, according to the charge sheet, and first appeared in Court on 4th February 1978. As I have stated, he was not sentenced until 10th May 1978. During that period of about 100 days he was not able to raise any money, except for the paltry sum of Shs 1500 inspite of the attempts made by him. What then was the purpose of inflicting a fine of Shs 30,000 and stating that emphasis should be on compensation when there might not be any reasonable chance of the respondent being able to repay the large remaining balance of the amount which he had stolen within a period of a few months before he appeared in Court? As this Court said in *R v Murefu Munyoki* (1942) 20 KLR (Part I) 64, quoting from a circular issued by Courts in India:

> The attention of the Courts is directed to the very great importance of exercising great discretion in regulating the sentences of fine passed by them so as to accord with the circumstances of the persons on whom the sentences are passed. Fines are sometimes imposed which are manifestly impossible of realisation, while there is reason to fear that many fines, imposed in petty cases, though realised, are paid only with difficulty. It would appear that in dealing with numerous petty cases some magistrates fall into a way of fixing the fines at particular amounts as a matter of course, without much thought as to how they will be felt by the particular individual on whom they are imposed.
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> It is a first principle in inflicting this mode of punishment that it is necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. Fines should never, in any case, be imposed which are not likely to be realised at all, and they should never be imposed in petty cases so severe as not to be easily realisable.

In a circular to magistrates (No 13 of 1956) headed "Notes for the Guidance

of Magistrates" issued on the instructions of the then Chief Justice, it is

stated, *inter alia*:

> Before sentence of fine (other than of a trivial amount) is passed, the magistrate should make enquiry as to the means of the convicted person to pay a fine. 'It is a first principle in inflicting fines that the capacity of the accused to pay should be considered ... *R v Murefu Munyoki* (1942) 20 KLR 64. If he is unable to pay a fine, then a sentence of a fine is pointless and wrong. A note should always be made on the record as to the result of the enquiry as to the accused's means, and any fine imposed should not be beyond his capacity to pay.

The above principle has been repeated by this Court on innumerable occasions with approval. In the instant case, the fine imposed was such that it was patent that the respondent was in no position to pay it or, almost, any portion of it. So, in effect, the sentence awarded to the respondent was one of six months' imprisonment which, with respect to the magistrate and with respect to the arguments of Mr Onyango Otieno, was totally inadequate besides being improper in the circumstances. I would also not like to see the practice of postponing sentence in order to give an accused opportunities to make restitution gain ground. As stated in *Archbold, Criminal Pleading, Evidence and Practice* (37th Edn) page 242, paragraph 720:

> It is wrong to postpone sentence in order to give an offender an opportunity of fulfilling a promise to make restitution: *R v West* (1959) 43 Cr App Rep 109.

The principles upon which a Higher Court will interfere with a sentence are well settled. In *R v Jamal-ud-din* (1934) 1 EACA 68, 73, the Court of Appeal for Eastern Africa ruled that it "ought only to enhance where a sentence is manifestly inadequate". In *R v Mohamedali Jamal* (1948) 15 EACA 126, the Court of Appeal for Eastern Africa again observed:

> It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.

In *R v Ratilal Amarshi Lakhani* [1958] EA 140, 141, a Ugandan case, Lewis J stated:

> It has been laid down in India that the High Court does not exercise the power of enhancing a sentence in every case in which the sentence passed is inadequate. The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than that which the trial Court had passed is no reason for enhancing the sentence. The High Court will interfere only where the sentence passed is manifestly and grossly inadequate. *R v Inderchand* (1934) 36 Bom LR 174. The same principle guides this Court when exercise the power of enhancing sentences imposed, as was in *R v Inderchand* under the Penal Code.

This Court has already given its views on sentencing in *The Republic v Abdul Mohamed Rahim* (unreported) and *Edwin Kipketer Tuimur v The Republic* (unreported) and I need not repeat the principles which should guide a Court. In *Ogola s/o Owoura* (1954) 21 EACA 270, the Court of Appeal for Eastern Africa held that an Appellate Court will only alter a sentence imposed by the trial Court if it is evident that it has acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of a similar nature, while not being precedents, do afford material for comparison.

Bearing in mind the gravity and prevalence of such offences, the position of trust and responsibility which the respondent abused, the systematic fraud over a period of time committed by him, and the large sum stolen by him out of which a very little portion has been recovered, but balancing all these factors against the facts that the respondent is a first offender, has pleaded guilty to the charge, has shown remorse, would lose his service benefits of thirteen years, has a large family to maintain and his illness, etc, a sentence of between two and a half and four years' imprisonment would not have been considered abnormal in this case.

I consider it a fit case in which an order for revision should be made. I set aside the sentence of fine, etc,

and substitute a sentence of two and a half years' imprisonment.

*Order accordingly.*

Dated and delivered at Nairobi this 14th day of July 1978.

**S.K SACHDEVA**

**JUDGE**