



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan & Law JJ A & Miller Ag JA)**

**CRIMINAL APPEAL NO 48 OF 1978**

**BETWEEN**

**JAVAN JOSSERA ONSERE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant pleaded guilty to a charge of stealing Shs 72,458/15 by a servant which came into his possession as cashier on account of his employer, Kenya Commercial Bank Ltd, contrary to section 281 of the Penal Code. He was sentenced by a Senior Resident Magistrate to a fine of Shs 20,000, or six months in default, with an order also to refund Shs 72,458/15 to the bank. The High Court exercising its revisionary powers under section 364(1) of the Criminal Procedure Code set aside the sentence and order made by the lower court and substituted therefore a sentence of two and a half years' imprisonment. The appellant has appealed to this Court against the sentence.

Under section 364(1), in the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, the High Court may:

(a) in the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by sections 354, 357 and 358 of the Criminal Procedure Code, and may enhance the sentence.

If a sentence thus enhanced is deemed to be the sentence originally passed by the lower court as being the sentence which the lower court acting properly ought to have pronounced, then no second appeal would appear to lie to this Court against the enhanced sentence for section 361(1) of the Criminal Procedure Code enacts:

Subject to subsection (8) of this section, any party to an appeal from a subordinate court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact.

Subsection (8) is not relevant.

We do not think that a sentence enhanced by the High Court should be deemed to be the sentence passed by the lower court. The principle seems to be analogous to that laid down in *Agani s/o George v R* [1960] EA 663, although that case was decided upon the wording of section 217A of the Criminal Procedure Code which has since been repealed. In that case an accused person was convicted by a magistrate but

sentenced by a judge of the High Court. It was held that an appeal against that sentence lay to the Court of Appeal. We think that the same applies to an enhanced sentence, and that an appeal against such an enhanced sentence should be considered as a first appeal. State counsel accepts that this is the position.

Furthermore, section 3 of the Appellate Jurisdiction Act provides:

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court Appeal under any law.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other powers, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.

Section 3 of the Appellate Jurisdiction Act would seem to confer additional powers upon this Court which are in no way less or reduced than the powers held by the High Court upon an appeal to the High Court from a subordinate court. In cases of this nature we would say that the powers of the Court of Appeal are co-extensive with the powers of the High Court upon a further appeal from the High Court to the Court of Appeal against sentence altered by the High Court in its revisional jurisdiction. We have therefore the power to deal with a sentence enhanced or otherwise dealt with by the High Court in revision under section 364 of the Criminal Procedure Code.

In the case before us we consider that the High Court acted properly in enhancing the sentence of the appellant who had stolen a large sum of money from his employer and who, on the face of it, received an obviously inadequate punishment. Even accepting that the appellant stole the money on the instructions of a senior bank official who received it, the appellant clearly knew that he was committing an offence, and in our view a custodial sentence was necessary. The Senior Resident Magistrate also ought to have realised that the order to refund Shs 72,458/15 to the bank was of no value as the appellant was unlikely to be able to meet it; such an order which is useless in effect ought not to be made.

The sentence passed by the High Court was a reasonable and proper sentence.

The appeal is ordered to be dismissed.

*Appeal dismissed.*

**Dated and delivered at Nairobi this 10th day of January 1979.**

**C.B MADAN**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**Ag. JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**