



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

HEZEKIAH MWAURA KIBE APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was convicted of forgery (section 350(1) of the Penal Code), uttering a false document (section 353) and obtaining money by false pretences (section 313) and was sentenced to five years' imprisonment on each of the first and second counts and to three years' imprisonment on the third count, the sentences to run concurrently. He appeals against sentence only.

The appellant was a transporter. He received a cheque for his services from Kenya Breweries Ltd. This cheque was for Shs 4597/25. He altered it to read Shs 94,597/25 before depositing it in his account with Kenya Commercial Bank in Nakuru. Shs 94,597/25 was credited to that account and the same amount was debited to the account of Kenya Breweries Ltd with Barclays Bank International Ltd, Government Road branch, Nairobi.

Sentencing the appellant the Senior Resident Magistrate said: "The amount in forgery involved is Shs 90,000 none of which has been recovered". This suggests, according to Mr Swaraj Singh who appeared for the appellant, that in the event of restitution even in part, the magistrate would have been inclined to impose a more lenient sentence. Restitution, he said, would eventually be made.

The appellant has an overdraft with Kenya Commercial Bank, Nakuru, secured over property mortgaged to the bank and the bank was enforcing its security. In *R v Bell* (1919) 14 Cr App Rep 36 the Court of Criminal Appeal in England said:

People who commit crimes, however bad they may be, should be encouraged to make reparation, and the only way we can encourage them to do so is to take into consideration when passing sentence on them the fact that they have done some good as well as some evil.

We agree that restitution is to be encouraged and is a factor which should be taken into account by a trial court in assessing sentence. Only in exceptional cases, however, can it be taken into account by an appellate court when made or offered after conviction and sentence. It then savours of an attempt to bargain for a reduction of sentence and is no indication of repentance and a desire to make amends.

In the present case it is not even voluntary since it appears that the victims of the appellant's crimes are in the fortunate position of being able to enforce restitution. The magistrate took into account previous

convictions from 1950 to 1961 but added:

Nevertheless, it would seem that after the last conviction, the accused apparently changed his way of life and has had unblemished record for the past 14 years.

We can see no reason to interfere with the sentences imposed.

Appeal dismissed.

Dated and Delivered at Nairobi this 13th May 1976

A.H. SIMPSON

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JUDGE

A. A. KNELLER

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JUDGE