REPUBLIC OF KENYA

IN THE HIGH COURT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO. 1323 OF 1966

REPUBLIC…………………………………………… APPELLANT

VERSUS

JOHN WILLIAM JONES ……..………………..…..RESPONDENT

JUDGMENT OF THE COURT

Sir John Ainley This is an appeal by the Republic by way of case stated from a decision of the Resident Magistrate, Nairobi. The respondent to the appeal was at the relevant times a chief clerk employed by the East African Railways and Harbours Administration. He was charged with two thefts of money contrary to section 280 of the Penal Code, it being said in the first count, that he on 24th December 1965, being a person employed in the public service stole Shs 3680 the property of the East African Railways and Harbours Administration, which came into his possession by virtue of his employment; and in the second count that on 12th February 1966, he being a person employed as aforesaid, stole Shs 400 which came into his possession by virtue of his employment.

At the conclusion of the prosecution case a submission of no case to answer on either count was made on behalf of the respondent, and the magistrate decided that question in favour of the respondent. It is from this decision that appeal is made.

There is a question, which we regard as well nigh academic, whether the respondent was employed in the public service; but with this we shall deal at the end of this judgment. The important question is whether the magistrate correctly directed himself as to the nature of the offence of theft under the law of Kenya.

As we have said the respondent was a chief clerk employed by the Railways and Harbours Administration. We add that he had sole charge of the imprest account in the district traffic superintendent's office in Nairobi. The cash comprising the imprest was kept by the respondent in a keyless numerical combination safe. It was against the regulations for the respondent to cash cheques from this imprest.

On 24th December 1965 (so we think the magistrate found) the respondent, contrary to these regulations, took from the safe a sum in cash of Shs 3680 and put in its place his own cheque for a like sum. He did the same thing on 12th February 1966, though on this occasion the sum taken was Shs 400 only.

In March 1966, the respondent fell sick and while he was incapacitated the safe was opened. The two cheques which were made payable to the Railways and Harbours Administration were found, still

uncashed, in the safe. They were presented to the respondent's bank and were honoured. When, however, the cheque for Shs 3680 was made out, there were no sufficient funds in the respondent's bank to meet it. There were funds to meet the cheque for Shs 400 on 12th February 1966.

The respondent had been paid £1413 7s a few days before 24th December 1965 and some thousands of pounds were coming to him from the Railways and Harbours Administration as the familiar "compensation for loss of career". We pause here to say that it is not known what the respondent did with the £1413 7s. He did not apparently pay it into his Nairobi bank at once. But we note that the respondent's superior officer said that he would have no hesitation in accepting the respondent's cheque for Shs 3680 and that, "he should be good for at least £1,000". In fairness to the magistrate and to the respondent, we intend to commit the technical error of going somewhat beyond the case as stated and of studying the tenor of the ruling complained of.

What the magistrate really said was that the respondent did not behave like a thief, that he did not behave dishonestly and that he was only (admittedly this, to some extent, begs the question) acting contrary to office regulations. The magistrate quoted a passage from the judgment of Lord Goddard CJ in *R v Williams* [1953] All ER 1068, 1070 which reads: It is one thing if a person with good credit and plenty of money uses somebody else's money which is in his possession - it having been entrusted to him or he having the opportunity of taking it - he merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to get. No jury would then say that there was any intent to defraud or any fraudulent taking, but it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future ... And the magistrate concluded:

I find on the evidence that the prosecution has failed to prove that when the [respondent] took the money he did so fraudulently and with an intent permanently to deprive the Railways Administration of it. He therefore found that that respondent had no case to answer and acquitted him.

Now Lord Goddard CJ was probably using the word "fraudulently" as meaning "dishonestly" and he sought to indicate, we think that there can be unauthorized takings of money which no plain man would call dishonest or thievish; and he was further saying, no doubt very truly, that if you cannot persuade a jury of twelve plain Englishmen that a man is dishonest, they will not call him a thief however much law you quote to them. We wish to say, however, that though we do not think it very helpful to apply epithets not used by the legislature to the conduct of a man accused of theft, it is clear that many men would regard it dishonest for a servant to take and use his employer's money against the known will of his employer, even thought that servant could easily replace the money, and intended to replace it.

However that may be, it was the duty of the magistrate to base his decision upon the law of Kenya and we think, with respect, that he failed to do so. He turned, so it seems, to the definition of stealing in the Larceny Act 1916 (England), and failed to notice the many differences between that definition and the definition of stealing contained in section 268 of the Penal Code. In the forefront of the English definition of stealing is the intent permanently to deprive the owner of his property. This has led to much argument when the defence of an intention to return money taken has been raised in England.

There is much less scope for such argument in Kenya. It is necessary in Kenya for the prosecution, in a case of theft, to prove a fraudulent taking or conversion without claim of right; but the legislature of Kenya, unlike the English legislature, has given a detailed explanation of what is meant by fraudulently taking or converting property, and a man is to be deemed to have taken or converted property fraudulently if he does so with any one of five intents. The intent permanently to deprive the owner of property is only one of the intentions set forth, and a glance at section 268 shows that a man who takes money without a claim of right (and thus presumably without the consent of the owner) is deemed to do so fraudulently if he takes it with an intent to use it at his will, although he may intend afterwards to repay the amount to the owner.

At the conclusion of the prosecution case there was before the magistrate the strongest evidence that the respondent had taken money not only without a claim of right and without the consent of the owner, but

contrary to the orders of the owner, and very ample evidence that the respondent's intention was to use the money "at his will'. That there was evidence of an intent to repay is true, but that in view of the provisions of section 268(2) (e) does not avail the respondent.

It has been argued that in both cases, but more particularly in the case dealt with by the second count, the placing of a cheque in the safe was equivalent to replacing at the instant of taking the cash which was abstracted. The respondent's actions, it is said, are closely comparable to those of a man who puts Shs 10 note in a safe and takes out Shs in coin. This argument is based on the definition of money in section 4 of the Penal Code; but with respect to counsel who advanced this argument, he is simply playing with words here. The definition reads "Money' includes bank notes, currency notes, bank drafts, cheques and any other orders, warrants or requests for the payment of money". A little reflection will show that his definition does not by some legal magic render a Shs 100 currency not indistinguishable from a cheque for Shs 100.

To our minds there was a clear case of theft to answer upon both counts. We turn to the question whether there was evidence of offences contrary to section 280 of the Penal Code. The magistrate thought not, because he held that an employee of the Railways and Harbours Administration was not "employed in the public service". The magistrate misunderstood the judgment of this court in *Gaciatta v The Republic* [1966] EA 277, but we inquire whether he reached the right conclusion by the wrong path. The State has not relied on section 85(4) of the East African Railways and Harbours Act, and though so far as we can ascertain the subsection has not been repealed, the State may have good reason for this. It is said, however, that a clerk employed by the Railways and Harbours Administration holds an office, the power of appointing to which is vested in a public commission or board, and that the respondent therefore is a person employed in the public service by virtue of paragraph (a) of the definition of such a person contained in section 4 of the Penal Code. Counsel for the respondent has declined to argue the contrary and we consider the submission of the State to be well founded. We do not answer the whole of the long list of rather involved questions. It is sufficient to say that the magistrate was wrong in holding that the respondent had no case to answer and in acquitting him at the close of the prosecution case. We set aside the order of acquittal. The case must go back to the court below with the direction that the respondent shall be required to make his defence to the two charges of stealing contrary to section 280 of the Penal Code.

Dated and Delivered at Nairobi this 22nd Day of November 1966

JOHN AINLEY

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CHIEF JUSTICE

MILES

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JUDGE