



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: GICHERU, LAKHA & O'KUBASA J.J.A  
CRIMINAL APPEAL NO. 154 OF 2000**

**BETWEEN**

**PIUS CHORONGO MBASHU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from a conviction, judgment or as the case may be of the High Court of Kenya at Mombasa (Commissioner of Assize Khaminwa (Mrs.) dated 28.8.2000

in

H.C.C.C NO. 178 OF 2000)

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**JUDGMENT OF THE COURT**

The appellant, Pius Chorongo Mbashu, was convicted on four counts of stealing by a person employed in the Public Service contrary to Section 280 of the Penal Code by the learned Senior Resident Magistrate at Kilifi. He was sentenced to 3 years imprisonment on the first count, 4 years imprisonment on the second count and to twelve months imprisonment on the third and fourth counts. The sentences were ordered to run concurrently. His appeal to the High Court was dismissed by the learned Commissioner of Assize. When the appeal came up for hearing before us on 25th January, 2001 in Mombasa, Mr. Mwanyumba for the appellant started his submissions by stating that both the trial and first appellate courts erred in failing to appreciate that the charge of stealing by a person employed in Public Service contrary to Section 280 of the Penal Code had not been proved beyond reasonable doubt.

The second issue raised in the course of Mr. Mwanyumba's submission related to handwriting. Reliance was placed on certain documents which the appellant was alleged to have signed. The appellant denied signing the documents. In view of this, it was Mr. Mwanyumba's contention that a handwriting expert should have been called to testify so as to determine whether it was, indeed, the appellant who signed the documents. The appellant was convicted mainly on the evidence of Charles Mbiti Ndoo (PW1) who described himself as a retired Senior Executive Officer attached to Mombasa Law Court. This witness (PW1) was shown various documents relating to the lost money and it was his conclusion that the appellant failed to surrender various amounts to the District Treasury. The record of the trial court shows that the appellant had raised this issue during his trial before the Senior Resident Magistrate at Kilifi. The appellant denied having signed the documents. In his judgment, the learned Senior Resident Magistrate stated:-

"In the instant case, I find it is the accused who used to receive money from the sub -cashiers and surre nder the same to Treasury. His handwriting is well known by Mr. Ndoo (PW1) who used to be his immediate boss. I am also satisfied that Mr. Ndoo is well conversant with Mr. Chorogo's signature which he pointed to the court on the receipts and the control sheets".

We have perused the evidence of Mr. Ndoo (PW1) before the trial court but we failed to find anywhere in that evidence where he said that the handwriting and the signatures on the various documents produced belonged to the appellant. In our view, a handwriting expert should have been called to show that the handwriting and signatures on these documents were those of the appellant.

In her judgment the learned Commissioner of Assize stated inter alia:-

"In the case of cheques they would be surre ndered to the Treasury to bank as mentioned above. But no doubt there should be a record of what happened to them. From evidence in court no evidence is shown whether the cheques were handed over to the Treasury and whether they were returned unpaid. The Appellant said nothing to shed light in this matter. The record shows that these cheques were never handed over to Treasury".

(emphasis provided)

Having considered the issues of handwriting and the standard of proof in criminal proceedings, we are of the view that the appellant was convicted on evidence of handwriting which was not conclusively proved as his. Again, it would appear that the first appellate court expected the appellant during his trial to shed some light on allegations made against him. It is trite law that the burden of proving an accused's guilt lay on the prosecution throughout the trial and that an accused person is under no obligation to prove his innocence. In the present appeal we find that although there was strong suspicion that the appellant might have been involved in some fraudulent transactions in which money got lost, we are not satisfied that the evidence on record was sufficient to prove that it was the appellant who stole the money as specified in the four counts laid in the charge sheet. We entertain some doubt on the soundness of these convictions and hence the appellant should have been given the benefit of doubt.

In view of the foregoing, we allow this appeal, quash the conviction and set aside the sentence imposed on each of the four counts. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 16th day of February, 2001.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**A. A. LAKHA**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**