IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 56 OF 2000

BETWEEN:

EDWARD NYAMATCHERENGA....................................APPELLANT

-and-

THE REPUBLIC...RESPONDENT

CORAM: **TWEA, J.**
Nkhoma, Counsel for the Appellant
Kamwambe, State Advocate, for the State
Kabvina, Official Interpreter

JUDGEMENT

This is an appeal from his decision of the Second Grade Magistrate sitting at Nchalo in Chikwawa. After hearing the appeal I made a ruling on 28th February, 2002 upholding the conviction and sentence but I reserved the formal judgment. I now proceed to give my formal judgment.

The appellant was charged and convicted of the offence of theft by servant. The charge read as follows:-

“OFFENCE SECTION AND LAW

Theft by servant contrary to section 286(1) of the Penal Code.

PARTICULARS OF THE OFFENCE

Edward Nyamatcherenga on or about the 9th day of November, 1999 at Ntchalo Trading Centre, Watitsa Shop in the district of Chikwawa being a person employed as a Shop Manager by virtue of employment failed to count for the sum of money amounting to K388,675.29 property of Mr. Mahomed S. Mia”.

Obvious this charge is defective in form and substance. S.286(1) does not create an offence, it is just an aggravated form of theft. The law makes special provision for theft by a servant or clerk by making such theft more serious. The proper way of charging thus aggravated form of theft is to cite s.278 as read with s.286(1). Further, the particulars of the offence are defective. First they cite “virtue of employment” and failure to count (account) for money this is the form that a charge under s.283(1) for theft by person employed in the public service should take. That offence raises a rebuttable presumption against the accused person once loss of goods is established. However, theft by servant under s.286(1) does not raise such a presumption. The proper way of citing the particulars was to cite theft; that the appellant “stole K388,675.29".

After due consideration of the above defects and taking into account that the appellant never objected to the charge at the trial and that he never argued this point at appeal. I find that he was not prejudiced at all by these defects. See **Rep v Nahuwo 1971-72 ALR (M) 433, Kuweruza v Rep. 9 MLR 7, Anslem Kapanga v Rep. Crim. App. 37 of 2000 (unreported)** I find that s.3 and s.5 of the Criminal Procedure and Evidence Code can be properly invoked in this case. I will thus uphold the substance of the charge as answered by the appellant in the lower court and also in this court.

The appellant raised five grounds in his appeal against conviction. The five grounds are on the burden and standard of prove and that the evidence did not support the finding of guilty.

I have examined the record and the judgment by the lower court. I do not find that the trial Magistrate misdirected himself on the burden and standard of proof, nor that he made a presumption against the appellant. It is clear from his judgment that he analysed the evidence and came to the conclusion that the evidence of the State was stronger than that of the defence. He also found that appellant person in his defence did not produce the book in which he alleged that he made recordings of transactions but that this was kept at his house. He also found that the defence witnesses actually gave evidence of there having been dealings between them and the

appellant concerning the appellant employers goods which were outside the official record. I fail to fault the findings of the trial Magistrate.

It had been submitted for the appellant that more shortage is not evidence of theft by the Shop-Keeper. Counsel for the appellant referred this court to the renowned cases of **R v Alifeyo (1923/60) ALR (M) p. 256 and Banda v Rep 1971-72 ALR (M) 383.** These are cases in point. However these cases go much further than what Counsel had impressed on this court. In **Banda vs Rep (supra) page 385** the court held that:-

"When a stock deficiency becomes subject of a charge of theft under s.286, in the absence of direct evidence of theft, it is the duty of the trial court to consider whether the relevant circumstances proved in evidence, including the deficiency; compel it to conclude beyond any reasonable doubt that the accused stole the money or property charged. Among the relevant considerations would be the size of the deficiency, whether persons other than the accused had control of the stock or access to it, whether it is reasonably possible that the deficiency is due to causes other than dishonesty on the part of the accused, and whether circumstances have been proved which suggest that the accused enrichedhimself by means of the money or goodsin his charge".

From the trial courts record, the trial Magistrate did look at all the above circumstances and took them into consideration. I have also looked at the evidence and find that the appellant's shortage was quiet enormous: K835,945.82. Of this amount K447,270.53 was accounted for by the fact that his employer and his family and associates took some stock or cash. The K388,675.29 was not account for. The appellant's only explanation was that his employer and family took away some stock which was not recorded. This the Magistrate disbelieved and I equally disbelieve it. First, it is on record that the appellant had been an employee for 10 years, that stock was taken every six months. There is no previous record of such losses. For an experienced person with such a record, the appellant cannot be heard to say he had suddenly become very careless as not to record drawings by his boss. Further his own evidence shows that he was converting stock to his own use by loaning it to his friends or associates and not accounting for it - he had also accumulated property during this period. I find that he stole the stock and or cash from his employers I dismiss the appeal against conviction.

On the appeal against sentence. I agree with the trial Magistrate. This was gross abuse of trust after more than ten years of service. This was pre-meditated, carefully planned and executed with a view to accumulate wealth for himself. The amount stolen is not small at all. The sentence of five years imprisonment with hard labour does not come to me with a sense of shock at all. In my view it errs on the lower side. I therefore discuss the appeal against sentence.

This appeal therefore fails in its entirety. The conviction and sentence stand confirmed.

PRONOUNCED in open court this day of 7th March, 2002 at Blantyre.

E.B. Twea

JUDGE