**IN THE COURTOF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Miller & Potter JJ A)**

**CRIMINAL APPEAL NO 17 OF 1977**

**Betweeen**

**BENARD MUNUNGI NJAU .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal against the dismissal by the High Court Sir James Wicks CJ and Hancox J, Nairobi, on 6th October 1976)***

**JUDGMENT OF THE COURT**

This is a second appeal the first having been dismissed by the High Court. We dismissed the present appeal at the hearing and now give our reasons.

The appellant Benard Mununginjau, a third-class District Magistrate at Kikuyu at the time material to the alleged offences, was tried and convicted by the Senior Resident Magistrate, Thika, on three counts of stealing by a person employed in the public service, contrary to section 280 of the Penal Code.

He filed a memorandum of appeal on eight grounds, then a supplementary memorandum amending ground 7 of the original memorandum and later an affidavit of averments explanatory of the amended ground 7.

The three counts of the charge against the appellant were stealing two amounts of Shs 400 each and one of Shs 200 on 15th, 18th and 20th February 1975, respectively; and the background to the case is noteworthy.

It would appear that the appellant may have been for some time appropriating sums of money from the revenue which had to be expressly dealt with and accounted for by the accounts section of the Court of which he was magistrate in the course of the financial affairs of that Court. He even urged at every stage of the case that, although he may have perpetrated apparent appropriations, they were done by virtue of permitted borrowing and not by stealing. The practice was shown by the evidence to have taken two distinct forms. The first, and basically, he would take sums of money from the revenue clerk of the Court and, against such sums, he would lodge with the clerk his personal bank cheques, dated or undated; and, upon acquiring sufficient amounts to clear the deficits so created, he would instruct that his covering

cheque or cheques (being held in abeyance) be then banked to the credit of the revenue.

There came the point in this practice when there was an out-going cashier, Kamunyu, who was succeeded by one Kaigwa on 18th November 1974; and, as Kamunyu was leaving, he handed over to Kaigwa one of the appellant's covering but uncleared cheques for Shs 660; and shortly thereafter the appellant altered this cheque to read Shs 4660 instructing Kaigwa not to bank it until he instructed him to do so.

It was from this juncture that the appellant's practice of acclaimed borrowing and repaying with the knowledge, acquiescence and involvement of Kaigwa took on a different complexion; the proved details of which, as mainly admitted by the appellant himself, can be summed up by the adage "digging a hole to fill a hole" (in the revenue).

Kaigwa (quite correctly) was treated as an accomplice by the trial court, but was nevertheless firmly believed when he said:

[The appellant] told me that he had invented another method of paying back the money taken by him. He said that he will impose heavy fines in assault and malicious damage cases and that later in his chambers he will make orders for paying some money out of those fines as compensation. He said that I should prepare vouchers for the compensations ordered by him, enter them in the ledger and then take the vouchers to him together with the cash money shown on the vouchers. I did all that. I went with the vouchers, the ledger and the money to his office from time to time. The [appellant] then signed for the payees, also as a witness and also the certificate at the back. He also signed over the said moneys for himself. Part of the said money he paid back to me towards the money taken by him from the revenue to which I earlier referred. This process of taking compensation money commenced in March after the audit on 11th March 1975. By that method the [appellant] cleared the money taken by him and I gave away his cheque for shs 4660 to him.

There was an audit on 11th March 1975 and Kaigwa handed over the cheque for shs 4660 to the auditor, the appellant being then warned to pay the amount. Shortly before this however, ie in Februrary 1975, the appellant (being pressed by Kaigwa to clear this amount) brought into operation the new method of borrowing from or through ordered fines and compensation; and in three criminal cases, ie 201 203 and 213 of 1975 decided on 17th, 18th and 19th February 1975 respectively, although the fines the appellant ordered were paid, the supposed three recipients gave evidence that they did not receive the relevant compensations of Shs 400, Shs 400 and Shs 200. They also denied that their purported signatures on the receipt vouchers for the three sums in question were their own.

Before this Court the appellant, still urging his trust in Kaigwa's integrity and that Kaigwa must have committed the offences, nevertheless admitted that he (ie the appellant) personally signed each of the payment vouchers in these capacities: (1) the person authorising payment, (2) certifying payment-out, (3) witnessing payment made, and (4) as payee in respect of the three alleged offences.

Before us the appellant's contentions were based on two principal grounds, ie (1) prejudice, and (2) the absence of corroboration as a rule of law. We will consider both these submissions.

A number of grounds of appeal allege that the evidence relating to shs 4660 was wrongly admitted and was prejudicial to the appellant (see grounds 1, 2, 3, 4 and 6). The trial magistrate considered in some detail how the appellant drew amounts at various times totalling at one stage to Shs 4660. This was the evidence of Kaigwa, the provincial and district accountants who checked the books of account on various dates, and the appellant himself who admitted that at one stage he had issued a cheque for the

amount in question which he claimed should have been banked. Considering the evidence before him the magistrate said:

I have considered the evidence before me with anxious thoughts. Kaigwa admitted knowing that he was participating in the commission of a criminal offence. His evidence must be treated as that of an accomplice. I have warned myself about the dangers involved in relying on such evidence. I have considered, with the utmost care, the law and the practice the Courts are to bear in mind when confronted by accomplice evidence.

Section 141 of the Evidence Act lays down that an accomplice shall be a competent witness against an accused person; and conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice. It was said by Scott J in *Emperor v Maganlal*, 14 Bom 119 that though there may be cases of exceptional character in which an accomplice's evidence alone convinces the judge of the fact required to be proved the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons, namely: (1) because the accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because as a participator in the crime he is an immoral person who is likely to disregard the sanctity of an oath; and (3) because he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.

In *Canisio s/o Walwa v The Republic* (1956) 23 EACA 453, after reviewing a number of decisions and *dicta* in years gone by, the judges concluded their judgment with a compendious statement of what they regarded as the true rule of law as to convicting on the uncorroborated evidence of an accomplice and the proper manner of applying that rule to any given case. On page 458 the said passage reads as follows: "Generally speaking it is a practice, founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified. The criterion as to whether such an exceptional case has arisen is the credibility of the accomplice or accomplices combined with the weight to be attributed to the facts to which they testify. The principal factors to be considered when assessing their credibility are not only their demeanor and quality as witnesses but also their relation to the offence charged and the parts which they played, in connection therewith, that is to say, the degree of their criminal complicity in law and in fact. A departure from the general rule of practice is only justifiable where, on applying that criterion in that manner, it clearly appears that the accomplice evidence is so exceptionally cogent as to satisfy the Court beyond reasonable doubt, and where accordingly the judge or judges of fact, while fully conscious of the general inherent danger of any such departure, is or are convinced that in the particular instance concerned the danger has disappeared."

Having considered the evidence as a whole including the defence and the submissions made and having directed myself on the above law and practice, I am satisfied that Kaigwa spoke the truth when he said that the [appellant] designed the scheme to take the money payable as the compensations for reducing his [the appellant's] liability on the cheque for Shs 4660. This amounts to theft in law. It appears that there are many more cases in which that was done although only three of them are brought before this Court. However, I am not concerned about those not before me.

The judges of the High Court on first appeal remarked:

Many other amounts including Shs 4660 were referred to in the evidence which only succeeded in clouding the essential issues and could have been prejudicial but the magistrate expressly said he was not concerned with the amounts not before him.

In our view, the evidence was properly admitted as showing the scheme which gave rise to the charges. It was relevant to show how the three offences were committed and the motive. All the grounds of appeal relating to the alleged wrongful admission of the evidence must therefore fail.

We find no merit in ground 5. In their evidence three witnesses denied that they received any money from the Court as compensation, notwithstanding that compensation orders were made in their favour and that they had apparently signed for the money. These circumstances cannot mean that the money stolen by the appellant was in fact money belonging to the complainants and not to the Republic. At any rate, the claim that they were paid the compensation was false, in so far as these complainants were concerned. The compensation was not paid to the victims but instead was used to clear the balance of moneys drawn by the appellant from the revenue.

Ground 7 which alleges interference with a defence witness by the prosecution was also raised in the High Court which dealt with the issue and was satisfied, in effect, that it was not established that the prosecution had interfered with the defence witness. We find no merit in this ground of appeal. Taking a statement from any person in a criminal case is part of the investigations, and we cannot say that there is interference by the prosecution merely because the defence proposes to call the witness.

Turning to the question of corroboration of the evidence of Kaigwa, the accomplice, although this was expressly dealt with by both Courts below with reference to *dicta* in several decided cases including *Akibaya v The Republic* (unreported) and *Canisio s/o Walwa v The Republic* (1956) 23 EACA 453, we would also draw attention to *R v Baskerville* [1916] 2 KB 658, where the rule is adequately stated:

Where on the trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.

The appellant contended before us that the High Court erred in upholding the conviction by reason of the context of this portion of its judgment:

We think that this was clearly a case in which the magistrate should not only have sought corroboration, but, in this particular case, that he should not have materially relied on Kaigwa’s evidence unless it was confirmed by other independent and reliable testimony, or by what is often called real evidence. We therefore have to consider (1) whether there existed such independent or real evidence, and (2) whether the magistrate’s, as we think, wrong approach is fatal to the conviction.

The High Court proceeded to examine the evidence and pointed out that there was no dispute that the appellant had amended his previously issued cheque to Shs 4660, or that the three compensation orders were made by the appellant; also that the appellant admitted signing the vouchers not only as a witness to the payee’s signature, but also as magistrate or registrar, and, indeed that it was he who made the certificates on the reverse of each voucher. It was also not in dispute that the three complainants in those cases did not get their compensation.

The High Court concluded:

We think that the foregoing provided a very strong *prima facie* case against the appellant that he, either alone or jointly, stole the amounts which were the subject of the three charges. If the magistrate had considered the case in this way we think that he would have inevitably rejected the appellant’s denials of theft and found the case proved against him beyond all reasonable doubt.

This is a case where corroboration was required by practice established to have force of law; however, as stated in Phipson's *Manual of Evidence* (8*th* Edn): "In no case, however, is the tribunal precluded from acting on uncorroborated evidence, provided that the danger of so doing is duly pointed out" and, as the magistrate also pointed out in his judgment, the position is the same under section 141 of the Evidence Act, which reads:

An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal because it proceeds upon the uncorroborated evidence of an accomplice.

In this connection we would draw attention to the following passage from the judgment of Lord Ellenborough in *R v Jones* (1809) 170 ER 1105 1106 (also quoted with approval in *R v Baskerville* [1916] 2 KB 658):

Judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness.

The magistrate, after setting out the evidence of Kaigwa almost verbatim in his judgment with comments on Kaigwa's own admitted complicity in the offences, which made him an accomplice, proceeded as we have already set out.

We consider that while the magistrate was clearly alive to the need for other independent and reliable testimony to corroborate Kaigwa's evidence, he considered that this was a case in which it was safe to convict without such other evidence to corroborate Kaigwa's, which he regarded as exceptionally cogent and he was:

so much convinced about the veracity of Kaigwa that I have no doubt in concluding that the scheme to steal the money was the brainchild of the [appellant] and that the [appellant] stole the money as stated in each count.

The magistrate adopted a course which is permitted by statute (Evidence Act), and which, without it being a wrong approach, is also followed in Courts; but fortunately only a few cases are treated as being of exceptional character as enunciated by Scott J in *Emperor v Maganlal* 14 Bom 119. The fewer there are of such cases the better.

The judges adopted a cautious approach in the interests of justice. Their approach would be appreciated by a reading of the following passage from the speech of Lord Morris of Borthy-Gest in *Director of Public Prosecutions v Hester* [1972] 3 WLR 910,919,920.

Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.

The interests of the appellant were doubly safeguarded, first, by the magistrate who (after warning himself that Kaigwa was an accomplice) carefully examined the evidence to see whether he could be

believed and came to the conclusion that Kaigwa was creditworthy. Secondly, by the judges of the High Court who also ensured that the evidence provided a very strong *prima facie* case against the appellant.

*Appeal dismissed.*

**Dated and delivered at Nairobi this 7th day of August 1979.**

**C.B MADAN**

**.....**

**JUDGE OF APPEAL**

**C.H.E MILLER**

**.....**

**JUDGE OF APPEAL**

**K.D POTTER**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**