**Odendo v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 22 February 1971

**Case Number:** 965/1970 (22/74)

**Before:** Trevelyan J

**Sourced by:** LawAfrica

*[1] Evidence – Theft – General deficiency – Duty to account daily – Whether charge based on a general*

*deficiency.*

*[2] Evidence – Books of account – Whether sufficient evidence – Whether other evidence led – Evidence*

*Act* (*Cap.* 80), *s.* 37 (*K.*)*.*

**JUDGMENT**

**Trevelyan J:** The appellant was charged on two counts of stealing by a public servant contra s. 280 of the Penal Code, the first charging him with stealing Shs. 7,229/35 “on divers days between 26 January 1970 and 3 February 1970 . . . as a cashier in the Judicial Department . . .”, and the second charging him in similar fashion with stealing Shs. 400 . He was convicted on the first count, the trial magistrate obviously being satisfied that the amount was stolen and that no one but the appellant could have stolen it, but he was acquitted upon the second because, in the words of the magistrate: “I think I might give to the accused the benefit of the doubt because the prosecution failed to establish that the Poor Box accounts were consistently kept by the accused at the relevant time. Whilst it is clear that the main (general) accounts were, as I have said, kept strictly under the supervision of the accused, or his directions or on information and vouchers supplied by him, there is a deficiency of evidence to establish beyond doubt that the accused and the accused alone was responsible for the Poor Box account book.” I set all that out in detail for two reasons, that the expression “the accused and the accused alone” shows that the magistrate had the matter of circumstantial evidence well in mind, which in this appeal it was alleged that he had not and that it disproves the contention that the “evidence was almost identical on both counts” whereby was meant that if an acquittal was called for on one, it was also called for on the other count. In any event it by no means follows that because there was an acquittal on the second count the evidence on the first was affected thereby; particularly so as the magistrate appears, with respect, to have misdirected himself by saying, “I *might* give to the accused the benefit of the doubt”; either there was, or there was not, a case for giving the appellant its benefit. The first count related to the Department’s main or general account and to understand what was involved I will set out, quite shortly, the system obtaining. The cashier, that is to say the appellant, received all the Department’s money in its various forms and out of it he made certain payments for which he would get a voucher or a chit. The money which he received or disbursed would be entered in a cash book except that chits (which I may perhaps say were in the nature of semi-official documents) were not entered in it but were treated as cash in hand. The cash book would be checked against vouchers etc. by an accountant and the cashier should make his check too. At any one time the money (and chits) in hand should agree with the cash book balance. Mr. Remedius of the Audit Department told the court below: “I agree that the accused’s cash book was kept up not by him but by another clerk. This has been the system for quite a long time. But the cash book is posted up on information received from the accused . . . a daily balance should be stated at the end of each day. The man in charge of the cash book should strike a cash balance at the end of the day, and agree it with the cash actually in the cashier’s possession. Such reconciliation is agreed between the cashier and the posting clerk, appropriate payments being made into the bank the following day. Daily the individual items in the cash book should be checked by one of the two accountants in the accused’s office against the vouchers held by the accused . . . he should pay into the Bank daily all the cash and cheques in hand.” Much has been made in this appeal (and indeed was made at the trial) about the fact that the appellant was not the writer of the cash book but the foregoing shows that he was required to agree the daily balance; and ordinarily he did so, apparently without difficulty. I will turn to the evidence again in a moment but I think it convenient now to deal with the ground that the appeal must succeed because the conviction was based on a general deficiency which is insufficient for such purpose. There is a rule that a general deficiency will not do but there are exceptions to it. In paragraph 1476 on p. 561 of the 37th edition of Archbold, *Pleading, Evidence and Practice in Criminal Cases* we find:

“. . .exceptions appear to be (i) where the separate takings are connected so as to form a continuous taking . . . and (ii) where there is a duty to pay over at stated periods a total previously received . . . In such cases it would appear that the defendant may be indicted for the theft of the total on the day he should have handed over the total, but failed to do so. The amount of the deficiency includes some odd cents so that, on the evidence accepted, it may or may not all have been taken at one go. On the other hand a considerable amount of money disappeared in a matter of a very few days. The fact that there was a daily duty to account does not prevent there having been a duty, both on 2 and 3 February, to account for the aggregate sum then outstanding. It seems to me that we are within the two exceptions to which I have referred. But in any event the cases of *R. v. Lambert* (1847), 2 Cox C.C. 309 and *R. v. Tomlin*, [1954] 2 Q.B. 247; [1954] 2 All E.R. 272 make it clear that the rule is one of practice only and not one of law, that it is not to be used as an engine of injustice and that the charge of an aggregate amount may be in order if on a certain day there is a duty to account for it. In the instant case on the lower court’s findings the amount concerned came into the appellant’s hands and he misappropriated it. As I see it one must use the general deficiency if one is to obtain justice in the circumstances obtaining. With regard to the use of the word “cash” in the charge – I did not mention this at the beginning of the judgment – it is argued that it cannot be said that it was cash which was taken but we have evidence that in the period concerned cheques were banked but cash was not and it seems to me correct to infer that it was bank notes and coins which were stolen rather than cheques. The figures given at the trial support this, or so I believe. In any event I do not think that it can be said that the prosecution limited themselves to bank notes and coins. From the system obtaining there was no real differentiation between them and cheques. Certainly was the appellant in no doubt about the case which he had to meet and it cannot be said that he was prejudiced in any way. It is not I think unfair to say that the only person who is able in so many words to say how much, in what form and when the money was taken is the appellant though the balances spoken about by Mr. Omolo give a clue thereto. I think it would have been more correct to have charged the offence as having taken place on 2 or 3 February – see Tomlin’s case; indeed it would have been best, as I think, to have had more than one count in view of the duty to account day by day, but s. 382 of the Criminal Procedure Code is to be applied and there was no prejudice in any case. Of course, under s. 137 (*j*) of the Code a gross amount may be specified in a case such as that put against the appellant. It is said that a conviction cannot in any event be sustained because of s. 37 of the Evidence Act but if one applies the section to the facts of this case it is of no avail to the appellant for, whatever shortcomings there may possibly have been, the books were kept in the ordinary course of business – I am assuming that the financial affairs of the department are a “business” – and the prosecution consisted in more than the mere presentation of account books to which no one could speak. There was, for instance, the evidence of the writer of the books, the evidence of Mr. Omolo and so on. The prosecution did not rely on “entries . . . alone . . .”. When a spot check was carried out on 3 February, a deficiency in the sum mentioned in the first count was, following a check, thrown up. But the appellant would not admit liability for it mainly, I think it fair to say, on the ground that as he did not keep the books himself he would not know if they were right or wrong. But in the ordinary course of events he made his checks daily and no difficulty or error appears ever before to have arisen – at least there is no evidence to that effect – and one may not unfairly ask why, on this occasion, with so much at stake he could not expose the error which, on his case, there had to be.

He told the court: “The first entry made for the day would be from pay-in slips, then the receipts would be posted from the receipt vouchers. At the end of the day the receipt vouchers would be totalled and compared with the total of the payment vouchers, and a balance would be struck. After balancing, all the cash and cheques would be placed in a voucher box which was deposited in my safe in my cubicle. It would be banked at about 10 o’clock the following morning . . . It is difficult to check this cash book without having the supporting vouchers.” But there should have been no difficulty at all; the supporting vouchers etc. should have been there or readily available. And though the appellant says that he was not given any opportunity to verify the cash book entries against their original vouchers, he admits that the relevant vouchers were kept in his cubicle. Mr. Yunis, the chief accountant, told the court: “The accused . . . broke the seals himself . . . The accused, my accountant Mr. Omolo and I started to check the cash and the cheques in the safe and drawer . . . I told the accused to investigate further and explain the discrepancies if he could . . . I asked the accused if he agreed the shortage but he did not agree the figures or that there was any shortage, and gave no explanation of the apparent discrepancy. He was present throughout when the cash and cheques in his possession were counted and totalled . . . I agree I can't speak directly to the accuracy of the figures drawn from the cash book by Mr. Omolo. But the accused was given every opportunity, with Mr. Omolo, to reconcile the figures in his cash book with the cash balance.” And Mr. Omolo, speaking of the check made on 3 February told the court about what was done. He said that the accused: “. . . took out all the money and cheques in the safe and drawer . . . The accused was standing by us in the cubicle . . . and then we started checking the accused’s cash book and vouchers. When I say ‘we’ I mean the Chief Accountant and myself to see whether they balanced against the cash in hand.” Pausing there I stress the words “cash book and vouchers”. He went on: “I started to check from 26 January this year because that was the last occasion on which the accused had banked . . . The deficiency between the cash book figures and the cash and cheques etc. in hand amounted to Shs. 7,229/35. The accused was informed of this shortage and was given the books to check himself . . . The accused checked the books himself in my office . . . He could find no error in our calculations and their results. He gave no explanation of the two deficiencies . . .” The evidence of Mr. Omolo was subjected to detailed examination and probing as to where the cash box was, whether the chits were in the drawer and so on, but everything needed was there or thereabouts, the appellant would know what, if anything, was needed for checking purposes, his whole future depended upon him accounting for the deficiency and if Mr. Omolo is to be believed, and the magistrate did believe him, the appellant “could find no error” and “gave no explanation”. Having in mind the system obtaining, if the cash and chits in hand did not agree with the cash book balances on or other or both of them were wrong. A check was made and the balances in the cash book verified. It would therefore be the money which the appellant had which was short of the amount which it should have been. The only person who could have had, and could account for, the deficiency was the appellant. He did not explain and he did not produce, nor did he try to explain nor did he produce it. I am unable to say that there was not admissible evidence upon which a conviction could properly have been entered. The magistrate relied a good deal on the appellant’s behaviour and this was criticised in this appeal. I do not think that the magistrate was wrong to have borne the matter in mind. If one considers that behaviour, as one is entitled to, within the rule in *Rafaeri Munyi v. R*. (1953), 20 E.A.C.A. 226, the case against the appellant is yet stronger. Finally it is said that the magistrate moved the burden of proof from the shoulders of the prosecutor to those of the appellant but in my respectful view he did not. With some regret, for I am dealing with a member of this department who has such a long period of service with Government, I can do nothing other than dismiss the appeal against conviction. The magistrate had some sympathy for the appellant which he manifested when he sentenced him. I shall nonetheless vary the sentence he awarded, i.e. the fine of Shs. 12,229/35 with 6 months’ imprisonment in default of its payment for two reasons, that it is better if not fairer when compensation is to be ordered to award it as such rather than as part of a fine and that no useful purpose was served by a penalty of Shs. 5,000/- which in the circumstances, and bearing in mind the offence which the appellant committed, he might be unable to pay. It will be remembered that he absented himself on 2 February and one can at least suggest that if he had had the money at that time he would have brought it on 3 February. With all that the appellant stands to lose and bearing in mind that the judgment was given some months ago and the offence was committed more than a year ago no punishment such as a binding over appears to be needed. I set aside the fine and its default sentence and in its place I order the appellant to pay compensation to the complainant in the sum of Shs. 7,229/35. This is a punishment: see s. 24 of the Penal Code. To this extent alone does the appeal against sentence succeed.

*Order accordingly.*

For the appellant:

*OP Nagpal*

For the respondent:

*WKN Mungai* (State Counsel)