KALENGA v THE PEOPLE (1968) ZR 165 (HC)
HIGH COURT
EVANS J
22nd NOVEMBER 1968

Flynote and Headnote

[1] **Criminal procedure - Sentencing - Frequency of offence in community.**
The sentencing judge should take into account the frequency of an offence in the community as one factor tending to support a severe punishment.

[2] **Criminal procedure - Sentencing - Compensation to the victim.**
A court should determine the proper sentence for the crime committed irrespective of any question of compensation to the victim.

The appellant in person.
Williams, State Advocate, for the respondent

Judgment

Evans J: The forty - year - old appellant was convicted on his own confession of a charge of theft by public servant, contrary to sections 243 and 248 of the Penal Code. Between 1st November, 1967, and 22nd February, 1968, he stole K82 of Government money while he was employed by the Government as a clerk in an office of the Ministry of Education at Mankoya. On 24th April, 1968, he was sentenced by the learned senior resident magistrate to eighteen months' I.H.L. w.e.f. the 22nd February and to pay a fine of K82; in default, six months' S.I., the fine, if paid, to be remitted to the Chief Education Officer as compensation. Against the sentence, to which he refers as twenty - four months' I.H.L. in his notice of appeal, the appellant now appeals. The appeal was entered a few days out of time, and I have heard it in the exercise of my discretion under section 295 of the Criminal Procedure Code.

In his filed grounds of appeal, the appellant alleges that the money was in effect "advanced" to himself to pay for children's school fees with the approval of his superior officer, whose successor agreed to his repaying the money by instalments, and he refers to the fact that he has to support ten children (he mentioned only five in the lower court), four of whom attend school.

It is, however, clear from what he told the lower court that he had no right to use the money for his own purposes, that its appropriation by him was not approved by anyone at the time, and that in fact his subsequent offer to repay it was refused. He is not appealing against conviction, and there is no reason to disturb it.

In all the circumstances of the crime and of the appellant, I do not consider the sentence of imprisonment to be excessive; indeed, it errs on the side of leniency. This offence carries a maximum punishment of seven years I.H.L.; it is one which is appallingly prevalent throughout Zambia and a matter of grave public concern. It involves a gross breach of trust, and the appellant was not entitled to the leniency normally accorded to a first offender because he was convicted in January, 1964, of theft by servant. [1] In my view, all thefts by public servants will continue to merit severe punishment until the present spate of such offences abates. I note that the learned senior resident magistrate observed, when sentencing the appellant, that he dealt with over seventy cases of this nature in the Barotse Province last year. Deterrent sentences are clearly called for in the public interest. [2] However, I consider that the lower court acted on wrong principles when, clearly in an attempt to recover the stolen money on behalf of Government, it fined the appellant the exact amount of the money stolen and ordered compensation out of the fine. Criminal courts should not act as debt collectors; Government should be left to its civil remedies. This offence merited a substantial term of imprisonment, not a fine. A court should determine the proper sentence for the crime committed irrespective of any question of compensation, and only if that sentence is one of or including a fine should consideration be given to awarding compensation out of the fine under section 164 (1) of the Criminal Procedure Code. It is, in my opinion, wrong in principle to divide punishment into a term

of imprisonment and a fine of or exceeding the amount of money stolen with view to recovering it for the complainant, and it can lead to injustice because, if the fine is not paid and the thief suffers imprisonment in default of payment, he still remains liable in law to repay the money. An order for compensation (limited to K50) may, of course, be properly made in terms of section 162A of the Criminal Procedure Code, and any such order should be enforced by distress and, in default thereof, by imprisonment for up to three months. Any such compensation recovered must be taken into account in any subsequent civil suit (subsection (2) of section 164 of the Criminal Procedure Code, the last line of which subsection contains the obvious misprint "of" for the word "or").

The sentence passed by the lower court is quashed, and in substitution therefor the appellant is now sentenced to two years' I.H.L with effect from 22nd February, 1968. The appellant should understand that Government remains at liberty to recover the stolen money by civil process.

Appeal allowed.