

R. v. KOZI MAKOKWA.

CRIMINAL APPEAL CASE No. 56 OF 1942.

Embezzlement—general deficiency—essential to prove the theft of some part of the sum deficient.

In this case accused was charged with stealing a certain sum of money. At the trial it was not proved that he had stolen any of the money but only that there was a general deficiency. The accused was convicted of theft but on appeal the High Court quashed the conviction.

Where there is a charge of embezzlement the particulars of the charge should contain the specific gross sum which the accused is charged with embezzling. See also *R. v. Milimo James*, p. 94 ante; *R. v. Samuel Banda*, p. 131 ante; *Abel Kabaya v. The King* 5 N.R.L.R. 13, all of which cases and the present one should be read in the light of *R. v. Lawson* 36 Cr. App. Rep. 30, 1952, 1 A.E.R. 804, and *R. v. Tomlin* 38 Cr. App. Rep. 82, 1954, 2 A.E.R. 272.

Law, C.J.: The law in cases of this nature is to be found in *Archbold*, 1938 Edition, p. 621, and, in particular, reference may be made to the case of *Rex v. Sheaf*, 19 C.A.R., p. 46, in the headnote to which it is said:

“Proof of a general deficiency without reference to specific dates may not be sufficient to support an indictment for fraudulent conversion. A general verdict of guilty on an indictment with a count bad in law is bad.”

On page 49 of that report, MR. JUSTICE AVORY stated:

“Reference to the authorities relating to embezzlement, in which it has been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received, makes it clear that these two counts in the circumstances of the case were bad in law and ought to have been withdrawn from the jury.”

2. Section 174 of the Criminal Procedure Code, which permitted a charge on a general deficiency, was repealed by section 22, Criminal Procedure Code (Amendment) Ordinance, 1940. In the present case the only fact which was charged and proved was a general deficiency. For the reasons given above, this is not sufficient to sustain the conviction of the accused under sections 243/249. Accordingly the conviction is quashed and the sentence set aside. The Attorney-General has intimated that he does not desire to support the conviction.

3. In the circumstances, owing to the repeal of the former section 174, Criminal Procedure Code, the case of *Rex v. Mardon Mateche* (N.R.L.R., 1931-1937, p. 98)¹ can no longer be accepted as authority in such cases.

¹ Not now reported.