

## **NASILELE v THE PEOPLE (1968) ZR 167 (HC)**

HIGH COURT

EVANS J

22nd NOVEMBER 1968

### **Flynote**

- [1] **Criminal law- Theft - Public servant, by - Accepting money in breach of administrative order.**

### **Headnote**

The fact that a Government servant receives money in violation of an administrative order does not absolve him of guilt under Penal Code, sections 243 and 248, if the parties paying out the money gave it to defendant by virtue of his Government employment, regardless of whether the defendant had the authority to accept it.

Statute construed:

Penal Code (1965, Cap. 6), s. 248.

*Collingwood, for the appellant.*

*Williams, State Advocate, for the respondent*

### **Judgment**

**Evans J:** The twenty - five - year - old appellant was convicted on his own confessions of four charges of theft by public servant, contrary to sections 243 and 248 of the Penal Code. He was employed by the then Ministry of Justice as a court clerk at Lutwi Local Court in the Kalabo District, and, on various dates between September, 1967 and March, 1968, on four occasions he stole the respective sums of K17, K10, K6, and K50, which came into his possession by virtue of his employment. On 3rd May, 1968, he was sentenced by the learned senior resident magistrate as follows:

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*Count 1* - nine months' I.H.L. and a fine of K17; in default, eight weeks SI

*Count 2* - nine months' I.H.L. and a fine of K10; in default, five weeks SI

*Count 3* - nine months' I.H.L. and a fine of K6; in default, three weeks SI

*Count 4* one year's I.H.L. and a fine of K50; in default, four months' SI

The terms of imprisonment were ordered to run concurrently, but the fines were imposed cumulatively, so that in sum he was sent to prison for one year with effect from 20th March, 1968, and ordered to pay fines totalling K83 or serve four months' and 16 weeks' S.I., in addition to the one year's I.H.L. On each count, the fines, if paid, were ordered to be paid as compensation to the provincial local courts officer.

The appellant appeals against the sentences and, with leave granted today, against the convictions. His appeal was filed four months out of time, but, in my discretion under section 295 of the Criminal Procedure Code, I have heard it, because I believe there is some substance in the reason given by the appellant for the delay, namely that appeal forms were out of stock at the material time. Appeals should not, of course, be held up on this account - it is a simple matter to type out some fresh forms.

[1] As to the convictions, Mr Collingwood on behalf of the appellant has argued that, on counts 1, 3, and 4, the convictions cannot stand as charged, because the stolen money in each case was received by the appellant as compensation ordered by the Lutwi local court to be paid between parties to cases heard by it, and not as Government property, and he refers to section 240 of the Penal Code. When money is ordered by a local court to be paid between parties as compensation, it should be paid, in accordance with current practice, by the paying party to the other party direct and, as Mr Collingwood has pointed out, Order No. 4 of the Standing Financial Orders for Local Courts, issued by the High Court, forbids the old practice of acceptance and custody of compensation money by local court staff. Mr Collingwood therefore argues that the appellant's acceptance of the compensation moneys in this case was *ultra vires* his employment. I do not agree. The fact that he accepted the

moneys in breach of some administrative order (the wisdom of which I doubt) does not alter the plain facts that the paying parties handed the moneys to him as clerk of the local court, that he received them as such and that they came into his possession by virtue of his employment. His stealing of them made his crimes thefts by public servant, because section 248 of the Penal Code reads:

"If the offender is a person employed in the public service and the thing stolen is the property of the Government, *or came into the possession of the offender by virtue of his employment*, he is liable to imprisonment for seven years." (Italics added.)

The particulars of the offences in all four counts included the words "the said money having come into his possession by virtue of his employment", and I therefore consider that the appellant was correctly convicted on counts 1, 3, and 4, and I do not think that the unnecessary inclusion in the particulars of the words "the property of the Government" affects the convictions in any way.

Mr Collingwood argues, in regard to count 2, that the appellant should not have been convicted on his own admission as charged, because, when pleading, he said that the stolen money was compensation, whereas, according to the facts recited by the prosecutor, the money was in fact K10, paid as a fine for contempt of court. I see no merit in this submission, because, whatever ambiguity there was in his plea, the appellant agreed that the recited facts were true - that he did steal the K10 - and that money was Government property and it came into his possession by virtue of his employment.

The appeal against the convictions is dismissed.

[The learned justice went on to discuss: (1) the justification for harsh sentences for crimes common in the community, and (2) the need for courts to determine criminal sentences without regards to compensating the victim. A discussion of these issues appears in *Kalenga v The People*.]

*Appeal allowed as to sentence.*