



REPUBLIC OF KENYA



**Onyango v Republic (Criminal Appeal E029 of 2022)
[2023] KEHC 27060 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E029 OF 2022
RE ABURILI, J
DECEMBER 20, 2023**

BETWEEN

LUKE ODHIAMBO ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence by the Hon. R.M. Oanda delivered on the 30th June 2022 in the Senior Principal Magistrate's Court in Winam in Criminal Case No. 402 of 2018)

JUDGMENT

Introduction

1. The appellant herein Luke Odhiambo Onyango was charged with the offence of stealing by servant contrary to section 281 of the *Penal Code*. The particulars of the charge were that on diverse dates between 11th June 2018 to 19th June 2018 at Kibos area in Kisumu East sub-county within Kisumu County, being a sales person of Kinangop Dairy Limited – Kisumu Depot, the appellant stole milk valued at Kshs. 649,015, the property of Kinangop Dairy Limited which came into his possession by virtue of his employment.
2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called five (5) witnesses. At the close of the prosecution's case, the appellant was placed on his defence and he elected he gave a sworn testimony.
3. In her impugned judgement, the trial magistrate found that the prosecution had proved the charges brought forth against the appellant beyond reasonable doubt and proceeded to convict and sentence the appellant to pay a fine of Kshs. 20,000 and in default to serve a term of one-year imprisonment.



4. Aggrieved by the trial court's conviction and sentence, the appellant filed his Petition of Appeal dated 10th July 2022 on the 13th July 2022 raising the following grounds of appeal:
 - i. The learned trial magistrate erred both in law and in fact by disregarding the threshold of reasonable doubt applicable in a criminal offence.
 - ii. The learned trial magistrate erred both in law and in fact by disregarding the facts of the offence and convicting the appellant on basis of extraneous matters.
 - iii. The learned trial magistrate erred both in law and in fact by handing in an illegal sentence against the appellant.
 - iv. That the learned trial magistrate erred in fact and in law in holding and/or finding that the prosecution herein had proved its case beyond reasonable, in absence of any tangible and/or credible evidence at all to that effect.
 - v. That the learned trial magistrate did not consider the conflicting evidence of PW1, PW2, PW3 and PW4.
 - vi. That the learned trial magistrate misdirected himself in fact and law, when he failed to properly or at all evaluate and/or analyse the ingredients of staling by servant with which the accused person was charged, thus reaching an erroneous conclusion insupportable by the evidence on record.
 - vii. That the learned trial magistrate is biased and did not consider the accused person's defence.
5. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

6. It was submitted that the prosecution failed to adduce convincing and credible evidence of the theft alleged to have been perpetrated by the appellant. The appellant further submitted that his work was not to collect money but to distribute milk after which the customers were to pay the monies to a till number.
7. The appellant submitted that the evidence relied upon by the prosecution on theft was circumstantial and did not meet the conditions set out in the case of *R v Kikering Arap Koskei and Another* 16 EACA.
8. It was thus submitted that the prosecution failed to prove its case beyond reasonable doubt to warrant conviction of the appellant and as such, the instant appeal ought to be allowed.
9. The ODPP was granted time to file submissions but they never complied.

Role of the Court

10. As a first appellate court; I am obliged to re-evaluate the evidence afresh and arrive at my own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Okeno v R.* (1972) E.A. 32.

Evidence before the Trial Court

11. PW1 Solomon Gachibu Kangethe testified that he was an administrator at the complainant Dairy Company. He testified that on the 11.6.2018 at around 11am, he loaded milk products onto a vehicle which was under the care of the appellant who served as a salesman for the company which goods were to be supplied to Khetias Supermarket and some on cash basis.



12. PW1 testified that he loaded milk worth Kshs. 825,825 in the appellant's vehicle and that by 19.6.2018, the appellant returned unsold goods worth Kshs. 53,031. He further testified that goods worth Kshs. 772,794 were sold out of which Kshs. 97,414 was paid vide M-pesa with the balance required to be settled within 24 hours which did not happen necessitating PW1's report to the police. It was his testimony that no recovery was made after the goods were delivered by the appellant.
13. In cross-examination, PW1 reiterated his testimony and further stated that Khetias Supermarket used to pay through cheques as they had credit terms with the Dairy Company.
14. PW2 Phillip Habakkuk Mandiany testified that he was the Dairy Company's Security Manager since 2013. He testified that on the 20.6.2018 at about 1430hrs, he received a call from the Finance Director alerting him that there was a theft incident at the Kisumu Depot and thus he was needed to travel there to verify the same. He testified that he travelled on the same day and commenced investigations which revealed that the appellant could not account for Kshs. 626,974 for milk products issued to him for sale and that he thus reported the issue to Kondele Police Station where the DCI took over the investigations.
15. PW3 Erick Mwongela Mutuku testified that he was an internal auditor with the Dairy Company having worked for them since July 2015. He produced the Audit report dated 25.6.2018 as PEX5 which he had compiled and which covered the period between 11th June 2018 to 23rd June 2018.
16. It was PW3's testimony that he established that the appellant failed to remit a sum of Kshs. 626,974 to the Dairy Company and thus recommended that the Dairy Company ought to initiate legal proceedings to recover the monies lost.
17. PW4 Edwin Irungu Maina the Dairy Company's Sales Administration Manager testified that he received a call from PW1, the Kisumu Depot administrator informing him that some of the salesmen including the appellant had not cleared their payments so he travelled to Kisumu on 21.6.2018 and met the appellant and informed him that he had 2 hours to settle the outstanding amount of Kshs. 626,049.
18. It was his testimony that the appellant gave him names of some customers who he alleged were owing money but when he called the said customers they all said that they had paid the money at the point of delivery.
19. PW5 No. 2427 PC Eliab Njihia testified that he took over investigations of this matter from one PC Sakiti after they had arrested the appellant, and that upon investigation, he established that the appellant failed to remit Kshs. 626,974 back to the Dairy Company. It was his testimony that he established that the appellant worked for the Dairy Company as a salesperson as was evident from PEX4, the appellant's letter of employment.
20. Placed on his defence, the appellant gave a sworn testimony that he worked as an assistant salesman at the Dairy Company. The appellant denied committing the offence and stated that his work was only to deliver the milk as the customers were supposed to deposit money in the Till numbers provided. He further testified that his supervisor was to ensure that payment was done.
21. The appellant testified that on the 9.6.2018, he delivered milk but the customer refused to pay. He testified that he reported the matter to Kondele Police Station. He testified that he reported another case on the 26.1.2018 at Bumala Police Station under OB 40 23/26/1/2018. It was his testimony that he was never informed the reason for his arrest and that he was being used as a sacrificial lamb.



Analysis and Determination

22. I have considered the grounds of appeal and the written submissions together with the evidence adduced before the trial court. The issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. Section 281 of [Cap 63](#), under which appellant was charged provides that:
- “If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable imprisonment of seven years.”
23. To secure a conviction under the above section, the prosecution ought to prove stealing also known as animus furandi or fraudulent conversion. It must also be proven that the stolen items belonged to the employer and that the offender is a clerk or servant.
24. The element of employment is undisputed, the same was admitted by the appellant in his testimony.
25. Stealing is defined in the [Black’s Law dictionary 8th Edition](#) as:
- “To take (personal property) illegally with the intent to keep it unlawfully”.
26. The definition of stealing as found in section 268 of the [Penal Code](#) is:
- “A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.”
27. In the instant case, the evidence adduced by the prosecution and specifically PW1,2,3 and 4 showed that the appellant was given milk to go and sell and that he was to surrender the proceeds therefrom to the Dairy Company which he did not.
28. It was the uncontroverted testimony of PW3 that the Audit report dated 25.6.2018, PEX5, that covered the period between 11th June 2018 to 23rd June 2018 showed that the appellant failed to remit a sum of Kshs. 626,974 to the Dairy Company following sale of milk. This was corroborated by PW1, PW2 and PW4.
29. Further, PW4 testified that when he confronted the appellant to produce the missing money, the appellant pointed towards some customers who had allegedly refused to pay but on inquiry by PW4, the customers revealed that they had paid the money at the point of sale. This testimony remained intact.
30. Juxtaposed against this evidence by the prosecution was the appellant’s defence in which he denied committing the offence stating that it was not his duty to collect the money after the sale but that it was his supervisor’s duty.
31. In a complete about turn, the appellant goes on to testify that in a given instance on the 9.6.2018, he delivered milk to one gentleman who refused to pay for the same. The appellant further testified that he reported another case of failure of a customer to pay on the 26.1.2018 at Bumala Police Station. This court notes that the instances cited by the appellant do not fall within the time under which the appellant is charged for stealing the Dairy Company’s money by failing to remit payments for the delivery of milk.



32. Taking all the aforementioned into consideration, it is my view that the appellant's defence was a mere denial and that it failed to displace the evidence adduced by the prosecution witnesses.
33. The appellant's defence and submissions were considered by the trial court contrary to the appellant's pleadings before this court.
34. The appellant further pleaded that there were inconsistencies and contradiction in the testimony of the prosecution witnesses. In the present appeal, this court agrees with the appellant that there was a discrepancy in the amount alleged to have been stolen in the testimonies of PW4 and that of PW1,2,3 and 5. However in my view, this discrepancy was not so material to warrant this court to conclude that the prosecution had not proved its case beyond reasonable doubt. This court agrees with the holding in *Philip Nzaka Watu v Republic* [2016] eKLR thus:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elai Nsamba Shapwata & Another V. The Republic*, CR APP. No. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

35. In the present appeal, any inconsistency and contradiction in the oral evidence adduced by the prosecution witnesses was resolved by documentary evidence which connected the Appellant to the theft.
36. I thus find that the prosecution proved its case against the appellant beyond reasonable doubt.
37. Accordingly, I find and hold that this appeal on conviction lacks merit. It is hereby dismissed.
38. Regarding the sentence meted out on the appellant which he pleaded in his Petition of Appeal was illegal, Section 281 of the *Penal Code* Cap 63 (Laws of Kenya) provides that:

“If the Offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”

39. The offence the Appellant was charged with carries a maximum sentence of seven (7) years imprisonment.



40. The Court of Appeal in Criminal Appeal No. 479 of 2007 *Daniel Kyalo Muema v. R* (2009) eKLR referred to the phrase “shall be liable” in regard to its construction. The court cited Section 66 (1) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”.

41. Section 26 (2) and (3) of the *Penal Code* seems to capture the spirit of the above section when it provides that:

“(2) Save as may be expressly provided by the law under which the offence concerned in punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”.

42. In the circumstances of the case, the sentence of paying a fine of Kshs. 20,000 or in default to serve one-year imprisonment was lawful and lenient. This court is thus not persuaded that it should interfere with the same.

43. Accordingly, I find and hold that the appeal against sentence also lacks merit, it is similarly dismissed. On the whole, the appeal against conviction and sentence is hereby dismissed. The conviction and the sentence imposed by the trial court is hereby upheld. It is so ordered.

44. This File is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

