



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ominde v Republic (Criminal Appeal 21 of 2022)  
[2022] KEHC 12480 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12480 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 21 OF 2022  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**JARED OMONDI OMINDE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon V Karanja (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case No 5154 of 2019 delivered on April 4, 2022)*

**JUDGMENT**

1. The appellant, Jared Omondi Ominde, was charged with the offence of stealing contrary to section 275 of the *Penal Code*. The particulars of the offence were that on September 30, 2019 at Kitale Township in Trans-Nzoia West sub county within Trans-Nzoia county, the appellant, jointly with others not before this court, stole kshs 2,500,000.00 (two million five hundred thousand) the property of Directorate of National Cohesion and Values. The appellant was subsequently arraigned in court to answer to the charge preferred against him. He pleaded not guilty to the charge. After full trial, the appellant was convicted and sentenced to a fine of kshs 3,000,000.00 or in default to serve three (3) years imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. In his grounds of appeal, the Appellant stated that the Prosecution had failed to discharge its burden of proof to establish the ingredients of the offence of stealing by servant. He was aggrieved that the trial court relied on CCTV Camera evidence yet the same never confirmed withdrawal of cash from the counter. He accused the trial court of failing to consider all the evidence on record including his defence, submissions and mitigation. He faulted the trial court for failing to find that the Appellant was not an AIE holder thus had no authority to transact on behalf of the Government. He stated that the trial court was in error for referring to the banking rules that were not presented in evidence. He alleged that the trial court erred in shifting the burden of proof from the prosecution to the Appellant. He lamented that the sentence that was imposed on



him was harsh and excessive. He prayed that this court allows the appeal, quashes the conviction, sets aside the sentence that was imposed on him and order that be forthwith set at liberty.

3. The Appeal was heard based on the parties' rival oral and written submissions. According to the Appellant's Counsel, PW1 did not disclose that he had authority to testify on behalf of the Complainant. He added that the Appellant was employed as a clerk and not an AIE holder. He thus did not have authority to make any transactions with Central Bank of Kenya (CBK). In the absence of the evidence of the Complainant's AIE holder or a representative from Central Bank of Kenya (CBK), Learned Counsel submitted that crucial evidence was missing for the benefit of the trial court. As a consequence, the Prosecution had failed to discharge its burden of proof to the required standard of proof. It was further submitted that the Appellant was convicted for operating his own savings account. The accusations preferred were based on the fact that he withdrew funds from an imprest account. The Appellant further submitted that this did not amount to stealing as the account in question was registered in his name. Counsel for the Appellant urged that no evidence had been presented to establish that the Appellant was seen receiving money with intent to deprive the Complainant. Thus, the trial court erred in holding that the Appellant had flouted the CBK regulations.
4. The Appellant submitted that the evidence before court disclosed that the Siaya team that had undergone training was paid. This was the correct position since their team leader did not testify to disprove this fact. Accordingly, that amount ought to have been excluded from the charge. The Appellant further accused the trial court of convicting him on the basis of suspicion since he had been seen carrying a bag. Finally, it was submitted that the sentence imposed on him was harsh and excessive. He pointed out that he was fined Kshs 3,000,000.00 yet the charge was based on the loss of Kshs 2,600,000.00.
5. Miss Kiptoo, Learned Prosecutor, submitted that all the ingredients to establish the charge of stealing had been sufficiently proved. She submitted that the Appellant confirmed and was seen withdrawing a sum of Kshs 2,600,000.00 from the bank in Kitale. This, she added, was after he confirmed that he had received funds from the Government to facilitate trainings in Kitale. She pointed out that the Appellant failed to challenge the evidence of PW1 and PW2. As a result, it was clear that the Appellant was guilty of the offence that he was charged with. She defended the trial court's findings stating that the trial court considered all the evidence on record, the Appellant's defence, the submission made and the Appellant's mitigation in arriving at its conclusion. She also submitted that the sentence meted out on the Appellant was fair and lawful. She urged this court to uphold the conviction and affirm the sentence.
6. The Prosecution called a total of four (4) witnesses in a bid to establish the charge brought against the Appellant. The Directorate of the National Cohesion and Values under the Ministry of Interior scheduled a faith based religious leadership training in Siaya and Trans-Nzoia Counties between September 23 and 27, 2019. This was in line with their proposal to conduct training for faith based organization leaders and to promote national cohesion, reconciliation and national values. The proposal, Prosecution Exhibit 1, capped the estimate budget for the proposed training workshops at Kshs 2,600,200.00. The said proposal was prepared by Edward Nyongesa PW1 but executed by its director Josiah K Musili.
7. The proposed budget proposal received the necessary approvals. Subsequently, on September 23, 2019, the said funds were disbursed to the personal account of the Appellant. The G-pay, taking the form of an RGTS transaction, Prosecution Exhibit 2 revealed that the money was disbursed from the Central Bank of Kenya. The Appellant was at that time in the employ of the Directorate as an account clerk/clerk officer. He was not an AIE holder. The letter dated May 2, 2012, Prosecution Exhibit 3



corroborated the fact as to his employment. During the pendency of his employment, the Appellant *inter alia*, obtained instructions from his supervisors including PW1 when on assignment.

9. PW1, the team leader of this project, testified on that on September 30, 2019, he was at Kitale Museum where a training was being held. The Appellant was on this day supposed to hand over the funds to PW1 for purposes of facilitating the program as per the approved proposal. PW1 was in the company of Beatrice Bikeyo, PW2 the Assistant County Commissioner at the venue. According to PW2, an AIE holder authorizes the withdrawal of cash in an account. They can however appoint another person to receive the cash on their behalf.
10. In the normal course of business, protocol dictated that since the Appellant's account was holding the funds for this particular training, the Appellant was supposed to be accompanied by security when withdrawing the funds. On this material date however, the Appellant skipped protocol. He called PW1 at 1:00 p m and informed him that he had proceeded to the bank to withdraw the said funds without such security.
11. Later at 3:00 p m, PW1 called the Appellant who informed him that he was at the police station. He reported that he was recording a statement that he had been robbed of the said funds. PW1 notified PW2 and proceeded to the police station where he found the Appellant together with the investigating officer recording his statement.
12. In his statement, the Appellant informed PW1 and the investigating officer that following the withdrawal of the funds from Equity Bank, he had placed the money in his car. As he was driving to the venue, he stopped over at Alakara Hotel to purchase water. On return to his car, he discovered that the front door of his car had been opened. The money had been stolen. Following these revelations, PW1 notified PW2 as well as the head office. The training was consequently cancelled.
13. Following the report at the police station, PW3, CI Sawe Kigen, attached to the forensic department, obtained the CCTV surveillance for September 30, 2019. He further processed eighteen (18) photographs from the surveillance. The photographs and CCTV surveillance footage captured in Disc A were marked in evidence as Prosecution Exhibit 4 (1-18) and Prosecution Exhibit 6 respectively.
14. In the exhibit memo dated July 13, 2021, marked Prosecution Exhibit 5, it was reported that the Appellant and an unidentified person walked into the banking hall with a black backpack. They sat at the couch next to the entrance while waiting for service. Thereafter, they proceeded to the banking room at the executive wing where the Appellant entered the room alone. The teller checked the document handed over by the Appellant and proceeded to serve him. After sometime, both persons left the banking hall.
15. PW3 testified that on viewing the CCTV surveillance, she noted that the Appellant received the funds from the teller desk in an envelope. After the money was withdraw, the Appellant placed the money in a bag.
16. PW4, PC Musila, the investigating officer accompanied the Appellant together with a team of officers to the said Bank. The corporate teller confirmed that the Appellant had withdrawn Kshs 2,500,000.00. He viewed the CCTV footage. He corroborated the evidence of PW3. PW4 asked the Appellant to take them to the area the Appellant alleged to have been robbed. He suspected that two ladies, onboard a Ugandan registration motor vehicle stole the money. On arrival at the scene, they found no shop. Instead, they were taken to Iroko Twigs Hotel. PW4 testified that the Appellant failed to give a satisfactory explanation as to why he withdrew the funds unaccompanied by a security officer. He then obtained a withdrawal statement of account for September 30, 2019 together with the bank slip.



They were produced and marked Prosecution Exhibit 7 (a) and (b) respectively. PW4 then pierced the evidence together and charged the Appellant with the present offence.

17. After close of the Prosecution's case, the trial court found that the Appellant had a case to answer. He was placed on his defence. The Appellant's sworn testimony was that he was a senior clerical officer and not an accountant clerk of the Complainant. He was not an AIE holder. He confirmed that PW1 was his supervisor. He testified that he was in receipt of an imprest warrant, Defence Exhibit 1, under his name prepared by Catherine Gacheru on September 10, 2019 for the sum of Kshs 2,600,200.00. The said funds were to facilitate a training for religious leaders in Siaya and Trans-Nzoia Counties.
18. The said funds were disbursed to his bank account via RTGS on September 23, 2019. He then withdrew the sum Kshs 2,600,000.00 on the same day. He produced his statement of accounts for the period January 1, 2019 to September 30, 2019 together with a cash withdrawal slip and marked Defence Exhibit 2 and 3 respectively. He testified that he was accompanied by police officer one Erick Githinji during this transaction. His testimony was that he gave PW1 the sum of Kshs 1,283,100.00 as per the proposal on the same day. The said funds facilitated the program in line with the per diem schedule, a register of the list of participants and schedule for reimbursements and schedule for venue and receipts for fuel for the County Commander. They were produced in a bundle and marked Defence Exhibit 4. He maintained that he was a participant in the said program as per Defence Exhibit 1 and was paid Kshs 29,400.00. He stated that Prosecution Exhibit 7 (b) did not correctly reflect the balance in his account. It also did not indicate where the sum of Kshs 2,500,000.00 originated from. He explained that the Kshs 2,500,000.00 withdrawn from his account on September 30, 2019 originated from a deposit from his business partner Esther Kariuki on September 27, 2019. He admitted that during the pendency of his employment, such transactions were normal into his account. He maintained that he never complained to PW1 that the money had been stolen. He denied committing the offence.
19. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See Njoroge -vs Republic [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof beyond any reasonable doubt that the Appellant committed the offence that he was charged with.
20. The definition of stealing is found in Section 268 of the *Penal Code*. It provides that a person is said to have stolen any property if the person fraudulently and without claim of right, takes anything capable of being stolen from another person. It must be remembered that the said property does not belong to the person. It further provides that a person is deemed to steal with any of the following intents:
  - a. an intent permanently to deprive the general or special owner of the thing of it;
  - b. an intent to use the thing as a pledge or security;
  - c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
  - d. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of taking or conversion;
  - e. in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner



From the evidence adduced, the following facts are not disputed:

1. the Appellant worked at the Directorate of National Cohesion and Values at the material times of the theft;
  2. he occasionally worked under the supervision of PW1;
  3. he was in receipt of the sum of Kshs. 2,600,200.00 from the Central Bank of Kenya;
  4. the sum in (3) above was disbursed for purposes of facilitating religious based training in Trans-Nzoia and Siaya Counties as per Prosecution Exhibit 1;
  5. he was to advance a sum of Kshs. 1,283,100.00 to PW1 to facilitate the Trans-Nzoia County training program that took place at Kitale Museum;
  6. The Appellant withdrew a sum of Kshs. 2,500,000.00 from Equity Bank Kitale Branch on 30<sup>th</sup> September 2019.
21. The substance of the charges levelled against the Appellant were pegged on the withdrawal transaction to his account on September 30, 2019. According to the Prosecution, the then scheduled faith based training program took place on that day at the Kitale Museum. In attendance were PW1 and PW2. PW1, the Appellant's supervisor, testified that the Appellant breached protocol by withdrawing funds in the absence of security who was required to escort him. He testified that the Appellant informed him that he withdrew the funds at 1:00 p.m. from his personal account in Equity Bank Kitale Branch. Later at 3:00 p.m., the Appellant informed PW1 that upon withdrawal of the funds, he was robbed of the same. He testified that he proceeded to the Police Station to record his statement as regard the alleged theft.
22. PW1, PW2 and PW4 testified that the Appellant recorded his statement in their presence. PW4's testimony was that the Appellant hoodwinked them when he testified that he was robbed in a shop. He instead took them to a hotel where he accused two ladies aboard a motor vehicle bearing a Ugandan registration number plate of stealing the money. When the Appellant was asked to explain why he withdrew the funds unaccompanied by a security officer, he could not give a satisfactory explanation. This is what led to his arrest.
23. In his defence, the Appellant maintained that the said funds originated from a previous deposit in his account by his business partner, one Esther Kariuki, on September 27, 2019. His evidence was that he did not steal the funds. He maintained that upon receipt of the funds from Central Bank of Kenya, he subsequently withdrew Kshs 2,600,000.00 on the same day accompanied by a security officer. He narrated that he proceeded to handover a sum of Kshs 1,283,100.00 to PW1. All the while, the Appellant testified that he was not an AIE holder and could not therefore deal with any funds originated from his employer.
24. In analyzing the evidence before the trial court, this court finds that the Prosecution witnesses corroborated their evidence on all the material respects. The Appellant was in receipt of the sum of Kshs 2,600,200.00 on September 23, 2019. He then withdrew a sum of Kshs 2,500,000.00 on September 30, 2019 after informing PW1 that he had proceeded to the bank unaccompanied by a security officer. This was in breach of his employer's protocol. He was at the bank at the time that was captured by the CCTV camera footage. He did not dispute that fact. It was further confirmed that on this very same day, he withdrew a sum of Kshs 2,500,000.00.
25. In his Appeal, the Appellant argued that he had not been seen withdrawing money as captured in the CCTV surveillance. However, his documentary evidence corroborated that of the Prosecution in that a sum of Kshs 2,500,000.00 was withdrawn on September 30, 2019 by the Appellant himself.



PW1 testified that he did not receive the said money forcing the cancellation of the trainings that had been scheduled. PW1, PW2 and PW4 confirmed the appellant's presence at the Police station while recording a statement on September 30, 2019.

26. Upon re-evaluating the Appellant's defence and submission on Appeal, this court finds his evidence and appeal to be incredible. Firstly, he maintained that he was not an AIE holder and could not therefore handle or deal with money from the Central Bank of Kenya. He however does not dispute that he was in receipt of the sum of Kshs 2,600,200.00 from the Central Bank of Kenya. Additionally, and as rightly observed by the trial court, a cursory perusal of his statement of accounts, Defence Exhibit 2, reveal that in the normal course of business, the Appellant on several occasions received imprest from his employer. He confirmed this in his evidence at the trial. Whether or not he was an AIE holder, the Appellant is cannot deny that he received imprest in his account from his employer. He cannot approbate and reprobate.
27. Secondly, the Appellant maintained that since he withdrew funds from his personal account, he cannot be accused of stealing. However, he was in receipt of Kshs 2,600,000.00 from his employer. He had previously, received such funds from his employer. The appellant held the said funds in trust for his employer. He was in receipt of Kshs 2,600,200.00 which funds were neither his salary nor any form of benefit from his employer.
28. Thirdly, the Appellant stated that he withdrew the sum of Kshs 2,600,000.00 on September 23, 2019 in the presence of Erick Githinji. He testified that he handed over those funds to PW1 on the same day. The Appellant further informed the court that on September 30, 2019, he withdrew the sum of Kshs 2,500,000.00 stating that it originated from an initial deposit by Esther Kariuki on September 27, 2019. One wonders why these two witnesses were not called to testify on behalf of the Appellant if indeed his story were truthful.
29. This court finds that the Prosecution proved the charge of stealing and discharged the burden of proof placed on it to the required standard of proof beyond any reasonable doubt. Consequently, the Appellant's appeal against the conviction lacks merit. It is hereby dismissed.
30. The Appellant was fined Kshs 3,000,000.00 or in default sentenced to serve three (3) years imprisonment. In his mitigation, the Appellant stated that he was remorseful. He stated that he had two (2) children and suffered a medical condition. He remained employed by the Government and prayed for a non-custodial sentence. Section 275 of the Penal Code provides:

"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

31. The Appellant was convicted of stealing Kshs 2,500,000.00. The trial court fined him Kshs. 3,000,000.00. Regrettably, the trial court did not establish a basis for the fine imposed. The fine imposed, without any guiding principle, was excessive. As a result, the Appeal against the sentence partially succeeds. The Appellant shall pay a fine of Kshs 2,500,000/= and in default he shall serve a sentence of three (3) years imprisonment.

It is so ordered.

**DATED AT KITALE THIS 25<sup>TH</sup> DAY OF JULY 2022.**

**L KIMARU**

**JUDGE**

