



**Isaboke v Republic (Criminal Appeal 17 of 2021)
[2022] KEHC 15039 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 15039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 17 OF 2021
REA OUGO, J
OCTOBER 31, 2022**

BETWEEN

BRIDGIT KERUBO ISABOKE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment and conviction of the Appellant herein by the Honorable Chief Magistrate N.S Lutta on the 16th day of September, 2021 in the original Kisii CMCCR Case No. 1332 of 2020)

JUDGMENT

1. This is an appeal against the judgment and sentence delivered by Honourable N.S Lutta (CM) at Kisii Law Courts on the September 16, 2021. The Appellant was charged with two counts.
2. On count 1, the Appellant was charged with stealing contrary to section 281 of the *Penal Code*. The particulars of the offence were that on August 31, 2020 at Kisii Township, in Kisii Central sub-county within Kisii County, being an MPESA Assistant at Greenbelt Technology Limited, stole Kshs 2,350,000/- the property of Greenbelt Technology Limited which came into her possession by virtue of her employment.
3. On count II, the Appellant was charged with giving false information to a person employed in the public service contrary to section 129 (A) of the *Penal Code*. The particulars were that on August 31, 2020 at Kamagabo Police station of Rongo sub-county within Migori county, informed police constable Joseph Kure, a person employed in the National Police Service, that she had been dragged into unknown motor vehicle at Kisii town while heading to Equity Bank and Kshs 2,350,000/- stolen, information she knew to be false intending thereby to cause the said police constable Joseph Kure to make and OB entry 48/31/08/2020 of robbery with violence which he ought not to have done if the true state of facts respecting which such information was given had been known to him.



4. The Appellant pleaded not guilty to the two counts and the case proceeded to trial with the prosecution calling 10 witnesses while the defense had three (3) witnesses.
5. At the end of the hearing, the trial magistrate convicted the appellant on both counts. On count 1, the appellant was fined Kshs. 150,000/- in default 3 years imprisonment while on the second count Kshs. 50,000/- and in default 1 year imprisonment.
6. The Appellant dissatisfied with the finding of the subordinate court filed a petition of appeal dated September 29, 2021. The grounds of the appeal were that the prosecution failed to prove its case to the required standard, that the prosecution evidence had glaring discrepancies and that the evidence of the appellant was not considered. The appellant sought to have the conviction and sentence set aside, varied and /or quashed.
7. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion, though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in *Okeno v Republic* [1972] EA 32.
8. Ali Noor Musa Aden (PW1) testified that he is a business man operating an M-pesa shop through his company Greenbelt Technologist Limited. On August 31, 2020 he left his employees including the appellant at around 3:00 p.m. to bank Kshs. 2,350,000/- and travelled to Nairobi. He was later informed that the appellant had not gone to the bank and her phone was switched off. His other employees Abdul Aziz Ismail (PW2) and Fabian Isaboke (PW6) both testified that the appellant was given Kshs. 2,350,000/- to take to the bank. PW2 who was the operations manager testified that the appellant normally takes money to the bank. On the material day, she had been sent to the bank 3 times, at 10:00 a.m., around noon and at around 4:00 p.m. PW2 and Pw6 confirmed that the money given to the appellant was Kshs. 2,350,000/- before she left for the bank at around 4:00 p.m. PW2 testified further that by 4:50 p.m. he could not trace the money in their system and called Equity bank but was informed that the money had not been banked. He looked for the appellant but could not find her and reported the matter at Kisii Police station. He was later informed that the appellant was at Rongo Police Station. PW6 testified that after they got information that the money had not been banked, he called the appellant using the office line but she could not be reached.
9. The prosecution also relied on the testimony of David Mocha Mogere (PW3), Collins Bosire (PW4) and John Momanyi (PW5) all of whom were boda boda operators working outside Equity Bank Kisii. Pw3 testified that he saw the appellant who came and sat at the shade. He asked her if she was travelling but she declined. He then saw her cross the road. PW3, PW4 and PW5 all testified that when a white vehicle appeared the appellant boarded it. PW3 recalled that the appellant was not forced to enter the vehicle. PW3, PW4 and PW5 all testified that they recorded their statements before viewing the Closed-circuit Television (CCTV) footage.
10. Police Constable No 260516 Joseph Kuria (PW7) testified that he is stationed at Kamagambo. On August 31, 2020 at around 5:40 p.m. the appellant reported that she had been robbed Kshs. 2,350,000/- within Rongo. Pw7 made an OB entry No 48/31/8/2020 and left the matter to the investigating officer.
11. No. 96188 PC Shadrack Kiplangat (Pw9) stationed at Rongo testified that he was informed that there was a case at the station involving robbery with violence. He went to the station and upon interrogating the appellant, she alleged that she was in Kisii town carrying money when she was pushed into a vehicle and taken towards Rongo. She claimed that one of the occupants of the vehicle had a pistol and she was tied with a rope and abandoned at Rongo. She was in the company of a lady alleged to have been a student. He handed the matter over to DCI Kisii. Upon reviewing the CCTV footage



he realized that the appellant entered the vehicle voluntarily and that she had given the police false information.

12. Chief Inspector No 235200 Samson Ogutu (PW8) testified that he is attached at the DCI headquarters forensic imaging and aquatic unit. His mandate was to process, analyze and certify photographs, images and electronic recordings in accordance with sections 78 and 106B of the *Evidence Act*. On September 17, 2020 he received an exhibit memo form from DCI Kisii Central accompanied by a DVD marked "A". It contained 3 files of CCTV footage. The exhibit memo was signed by PC Denis Mugambi. Pw8 had been requested to process the CCTV footage and draft a forensic report. He analyzed the footage and captured 11 stilt photographs extracted from the CCTV video footages recorded by 3 sets of CCTV cameras installed within V.S hardware building in Kisii. He also came to Kisii town and conducted a crime scene visit. He testified on cross examination that he was not able to capture the number plate of the vehicle. He also testified that the CCTV footage indicated the time in question.
13. No. 96075 PC Dennis Mugambi (PW10) testified that on August 31, 2020 he was tasked to investigate a case of stealing by servant. He met with the manager of the company who informed him that the appellant was given money to bank but had failed to do so and her phone was not going through. The appellant had made a call to another employee by the name Purity alleging that she had been kidnapped in Kisii town and dumped in Rongo. He proceeded to Kamagambo police station where the appellant was being interrogated having made a report on alleged case of robbery with violence. PW10 recorded statements, got relevant footage and wrote a letter to the cybercrime unit and the footage was extracted. He received the forensic report which he shared with the police in Rongo. Pw10 realized that the appellant had given wrong information to the police and had stolen money. On cross examination he testified that the CCTV runs on BUR machines that require the time to be set and if it is not set then it gives a wrong reading.
14. At the close of the prosecution case the court found that the appellant had a case to answer and put her on her defense. The appellant testified as DW1. She recalled that on the material day she was given a bag with money but did not know how much it was. She was unwell and had taken medicine. She boarded a motor cycle and upon alighting at Equity Bank, she crossed the road to purchase drinking water. As she crossed the road a white vehicle approached, the back door opened and she was pulled in hurriedly. Two people held her by the mouth and blind folded her. They tied her hands and legs and took the money she had. The vehicle proceeded towards Kisumu road and she was confused. She found herself in Rongo Town. She denied that the CCTV footage did not relate to her as it was taken at 8:34 a.m. to 8:38 a.m. while her abduction was at 4:30 p.m. Wyder Mbunya Ondieki (DW2) testified that on the material day he had a pillion passenger who had gone to the bank to make a withdrawal and he waited for him outside. He then saw the appellant cross the road but suddenly a white vehicle stopped and the lady was pushed inside. Veronica Atieno (DW3) testified that she is a student at Rongo and that on August 31, 2020 she had come from a church camp. She saw the appellant by the side of the road crying. Her hands were tied and she was blindfolded. The appellant informed her that she had been hijacked and her property stolen. DW3 took the appellant to Kamagambo police station.
15. The trial magistrate after considering the evidence by the parties convicted the appellant on both counts. In its judgment the trial magistrate held that:

"...in light of the evidence adduced and the reasons I have set out, the accused planned to steal from her employer and went ahead to do so. Her defence and that of her witnesses does not hold any water. The accused went ahead and reported that she had been robbed to try and cover up the offence of stealing. I find that the prosecution has proved its case against the accused person beyond any reasonable doubt in respect of both counts..."



16. This court has taken into consideration the trial court record together with the submissions filed and find the following to be the questions that arise before this court: whether the prosecution proved its case beyond reasonable doubt; and secondly, whether there has been established a case to interfere the trial court's findings on conviction and sentence meted out by the trial magistrate.
17. The appellant through her counsel, Mr. Ochoki, argued that the prosecution failed to establish the nexus between the stolen money and the appellant as the money was never recovered. The appellant cited the case of *Humphrey Wachira Karimi v Republic* [2019] eKLR where it was held as follows:
 - “32. In respect of issue (b) therefore I find in the positive, because the court found that the appellant's defence is scanty, however the prosecution has not established the nexus between the appellant, the stolen gaming machines and the vehicle that was recovered. The appellant has questioned the agreement that was produced by PW1 in his submissions and the mere fact that his name appears on the agreement without a copy of his identity card and without evidence during trial confirming that the appellant's signature is on the agreement is not enough to establish the element of the offence that he was charged of.”
18. According to the appellant, the CCTV footage availed in court did not cover the period of the alleged theft. There was no evidence that the appellant wore a red dress on the said date to justify the inference that the lady on the footage was the appellant. The evidence of PW3, PW4 and PW5 were not credible as they made their statements one month after the accused persons were arraigned in court and that PW5 could not identify the accused person in the dock. It was contended that the evidence by the appellant and her witnesses were more credible while that by the prosecution was circumstantial. The prosecution also failed to prove that the appellant had given false information. The appellant was of the view that the sentence imposed by the trial court was excessive as the court failed to consider that the applicant was first time offender.
19. On the other hand, the respondent in its submissions argued that it discharged the burden of proof. It was argued that there was evidence showing that the appellant was an employee of the company and that she acknowledged receipt of Kshs 2,350,000/- which was to be banked. The CCTV footage was played before the trial court and a report produced to that effect. It was shown that the appellant was making phone calls before voluntarily entering the motor vehicle and the vehicle was heading in the Rongo direction. The prosecution argued that it can only be inferred that the appellant planned to steal the money and she indeed stole from her employer. It was submitted further that after the appellant stole from her employer, she gave false information to a public officer. On the issue of sentence, the prosecution urged court to increase the sentence as the mandatory sentence for the offence under count 1 is a custodial sentence of 7 years and 3 years imprisonment for the offence in count 2. They contend that the court should increase the sentence and make it punitive to the appellant by either increasing the fine or order for a custodial sentence without an option of fine.
20. After analyzing and evaluating the evidence, I find that the following facts are not in dispute: that the appellant was an employee of Ali Noor Musa t/a Greenbelt Technologist Ltd. It was also not contested that the appellant was given money belonging to the company to bank at Equity bank.
21. The appellant was accused of the offence of stealing by servant and the prosecution was mandated to prove its case beyond reasonable doubt. Section 281 of the *Penal Code*, Chapter 63, states 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.” The definition of stealing under section 268 of the *Penal Code* is as follows:

“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.”

22. It was therefore vital for the prosecution to prove that the appellant stole the money. PW3, PW4 and PW5 have all testified that they saw the appellant around Equity Bank and when a white vehicle came, she boarded the vehicle voluntarily. There was no evidence from the prosecution showing that an identification parade was conducted to positively identify the appellant. It was not established that the appellant was known to PW3, PW4 and PW5 before the incident. The witnesses did not give any evidence describing the appellant in their testimony and in my view the identification could not have been positive.
23. The prosecution also relied on the CCTV footage. Pw8 produced into evidence PEXH 7. This was a certificate certifying that the recording device operating status was without any defects or malfunctioning and can be relied on to record and produce video in the appropriate design and performance. In the Forensic Imaging and Acoustic Analyst Report (PEXH6), Pw8 formed the opinion that the alleged offence did occur and it involved the appellant. He placed the appellant at the crime scene on August 31, 2020 between 08:34:06 and 08:38:29 a.m. The appellant was seen in the morning of the material day entering a white motor vehicle. The trial magistrate who viewed the footage in court stated in his judgment:

“PW8 No. 235200 chief inspector Samson Ogutu produced in court the CCTV footage outside Equity Bank Kisii on that day.

It was played in court and I had the benefit of seeing it.

The accused person had a bag. She paused outside the bank and made a call. She crossed the road and after a short while a white vehicle appeared. The accused entered the vehicle and it sped off.”
24. While it was established that the CCTV camera captured the appellant, according to the footage this was between 8:34am and 8:38 a.m. contrary to the facts of the prosecution case that the crime took place around 4:00 p.m. Although the investigating officer, PW10 explained that the CCTV run on a BUR machine that requires the time to be set and the same had not been set, I find that his explanation was contrary to the Forensic Imaging and Acoustic Analyst Report which did not indicate any defect or explain that the time had not been set. Although the prosecution did prove that the appellant entered into a white vehicle, this was in the morning of the material day. There was therefore no evidence to show that the appellant entered a white vehicle voluntarily at around 4:00 p.m. when she is alleged to have stolen the money.
25. It is therefore plausible that she was hijacked and robbed as alleged in her defense. Having found no evidence pointing out to a theft, the second count also fails as it was premised on the finding of guilt of the first count.
26. In conclusion, I find that the conviction arrived at was therefore unsafe and which must be interfered with. The upshot of the foregoing is that I find merit in the appeal. The same is allowed. The conviction is hereby quashed and the sentence set aside.



**DATED, SIGNED, AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT BUNGOMA THIS
31ST DAY OF OCTOBER, 2022**

R.E. OUGO

JUDGE

In the presence of:

Kerubo Bridgit Appellant

Miss Ndemo for the Appellant

Mr. Nyang'cha for the Complainant (Lower Court)

Wilkister – Court Assistant

