REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 14 OF 2020

ALPHONCE KIETI NYENZE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 91 of 2019, Honourable Keago dated, 27/1/2020)

BETWEEN

REPUBLIC …….……..…….....….PROSECUTOR

AND

ALPHONCE KIETI NYENZE…….……..……..……ACCUSED

JUDGEMENT

1. The appellant, **Alphonce Kieti Nyenze**, was charged, tried, convicted and sentenced at the Chief Magistrate's Court at Machakos for the offence of stealing contrary to Section 268(1) as read with Section 275 of the ***Penal Code***. The particulars were that the Appellant, on 24th December, 2016 at Mutituni Area in Machakos Sub-county within Machakos County, jointly with others not before court, stole cash Kshs 5,000,000.00, the property of the late **Catherine Nduku Kaloki**.

2. The prosecution called six witnesses who testified in support of its case.

3. PW1, **Simon Ouma Halonda**, who was KCB Machakos, Branch Manager, testified that **Catherine Nduku Kaloki**, (the deceased) was the Bank's agent who as assisting the Bank in disbursing money to those entitled under the Cash Transfer Programme (Inua Jamii) in Machkos and Mitaboni. According to him, the money was credited in the Beneficiaries' Card and before being paid, the cards would be run on a gadget and would be paid by the agent from float accounts which was registered in her name. Accordingly, the agent was at liberty to withdraw and pay the money immediately the card was run.

4. On 26th December, 2016 they were in the process of paying older persons in Machakos and Mitaboni through the deceased and the deceased had left to do so. However, at around 11 am, PW1 received news that the deceased had been involved in an accident and passed away. In the company of other members of staff, PW1 proceeded to the scene of the accident but found that the body of the deceased had been taken to the mortuary. At the scene they found the deceased's brother who informed him that the deceased had left Machakos in the company of the Appellant who had been injured and was taken to Machakos Level 5 Hospital for treatment.

5. At the Hospital, they found the Appellant undergoing treatment. He informed them that there were some items in his house which he had collected from the scene which he wanted to hand over to the mother of the deceased, PW2. Accompanied by PW1 and the member of the deceased and members of KCB staff, they proceeded to the Appellant's house and though PW1 did not accompany the other people who entered the Appellant's house, he met them carrying some money tied in a sweater, Safaricom Sim Cards, and a bag. Based on his advice, it was decided that the money be counted and kept in a safe. Upon counting it was found that the money, some of which was in a torn and unsealed envelope while the rest were naked and unopened amounted to Kshs 643,000/- which they kept in open torn and unsealed the said items were kept in a safe while the bag and the sim cards were given to PW2

6. According PW1, since the deceased had shops in Tala and in Mitaboni, they took PW2 to collect the deceased's items from Tala and Mitaboni after that he filed the report. When they realised that they had not collected the gadget that was used by their agents to identify the beneficiaries they called the Appellant but he was unreachable and they were unable to trace him at his house. On 28th December, 2016 they were informed by their Regional Office that there were two beneficiaries whose cards had been run and they were required to locate the gadget since they were required to pay for the same. After receipt of an affidavit, they were authorised to pay for the said claims

7. PW1 testified that they debited their books with Kshs 1,180,000 in order to facilitate payments to older persons whose cards had been run while asking the deceased's estate to pay the same. It was his evidence that the deceased had two accounts and had withdrawn a total of Kshs 2,190,000/-

8. According to his evidence it was the Appellant who volunteered while at the Hospital that he had some items from the deceased. He confirmed that he knew the Appellant having met him severally as the deceased used to instruct them to give money to the Appellant and that the two had an extremely cordial relationship.

9. On 24th December, 2016, upon receipt of the news of the accident from her son, PW2, the deceased's mother proceeded to the scene where she found many people and many vehicles while the body of the deceased was lying down in a raised ground. According to her the deceased had a creamish vehicle registration no. KAZ 066, Toyota Noah which had landed on one side in a ditch off the road. She was informed that the deceased's items had been tied together and given the Appellant who was with the deceased. According to her they had been with the deceased and the Appellant when they collected money from somewhere and that the Appellant worked for the deceased at Machakos and Mitaboni and Tala.

10. At Machakos Level 5 hospital, where the Appellant had been taken, the Appellant initially denied having seen the money but upon her insistence, disclosed that he had one envelope that he recovered. PW1 who was present stated that the money was theirs and he will follow up. They then proceeded to the Appellant's home where he was left in the vehicle while the Appellant went into his house accompanied by PW1 and a lady from the shop and they came out carrying a waste paper basket (plastic) inside which was a large envelope and it was torn but from which Kshs. 1000/= notes were protruding. They also brought the deceased's bag and another rucksack. They then proceeded to KCB Machakos Branch where upon counting they found it was Kshs. 643,000/= which PW1 deposited in a safe and issued a slip.

11. After that they set off for Mitaboni where the money was destined and took over their machines used to pay the elderly citizens. They then collected the deceased's items from Tala. We took what we could and brought to the home of my later daughter.

12. On 29th December, 2016, while she was recording her statement at Machakos Police Station she heard PW3, say that there were three envelopes at the scene, all given to the Appellant. She however did not know how much money the deceased had though KCB was demanding some more money from her. All the money she saw is the Kshs. 643,000/= which was placed in a safe and was still there.

13. PW3, testified that on 24th December, 2016, he was at home in Mumbuni around 10 am when he heard a burst from the road about 150 feet from his house. When he proceeded to the road, he saw a vehicle make Noah was involved in an accident and had tipped on its side and the wheels off ground. The vehicle had knocked down a lady who was in front. Inside the vehicle, off the road, were 2 people, a man and a woman. The driver was trying to get out but was squeezed as his side was the one down. PW3 opened the rear door for the other passenger, a young man, the Appellant who was bleeding from the left temporal region. The Appellant requested him not to include him in the rescue mission. Upon noticing a torn envelope, with money, the Appellant informed him that they were carrying money to pay out at Mitaboni and asked him to get into the car and get two other envelopes pointing out where they were which PW3 did and handed over the 2 envelopes to the Appellant who held onto them hence holding three envelopes. The Appellant then called a number and a short while later, a lady came in a saloon vehicle, alighted and went into the accident vehicle. She took the handbag and sweater and wrapped the envelopes in the sweater and both the lady and the Appellant left in the salon vehicle.

14. According to PW3, at the time he was opening the boot, other members of the public were watching them.

15. According to PW4, a Pastor with AIC Kyanda, Mutituni, on 24th December, 2016, around 10 am, he was at home from a prayer meeting when a motor cyclist informed him that there had been an accident and PW4's sister, the deceased, was involved around Kisooni. According to him, his mother, PW2, and his wife were the first to go to the scene as he remained with the children. A few minutes later, he also went to the scene where there were many people at the scene upon learning that the deceased had passed on.

16. According to him, since the deceased was an agent of Safaricom, he proceeded to the business premises and gave instructions all transactions be stopped and they took the body to Montezuma Funeral Home after the same was released to them by the police.

17. On 25th December, 2016, at 8 pm he received a call from the Appellant who was the deceased's employee whom he knew well who wanted to speak to him. PW4 agreed to meet the Appellant with the Appellant's father. on 26th around 9 am but did not telling PW4 that he was in hospital.

18. On 28th December, 2016, they went to KCB, Machakos to inquire how much the deceased had withdrawn to take to Mitaboni and they were informed by the Manager she had withdrawn Kshs. 2.1 Million.

19. PW5 who was then based at Machakos Branch in charge of Channel Business (alternative banking) which involved agency banking and merchant clients testified that on 24th December, 2016, he received information that one of their agents, the deceased, had passed on. He then relayed the information to PW1 after which they rushed to the deceased's shop at Machakos, opposite Universal Traders where they met the deceased Sister, **Faith Mbulwa**, who showed them the scene of the accident where they met the deceased's brother, PW4, and 2 police officers.

20. Upon learning that the body had been taken to the mortuary, they proceeded to the hospital where they found PW2 and the Appellant. While there, the PW2 mother directed the Appellant to go show them where the other money was kept after which they boarded the bank vehicle and proceeded to the Appellant's house where the Appellant pulled out a white wrapped sweater and a carton with sim cards and side mirrors. However, no money was recovered from the house. Upon going to the Bank they unwrapped the sweater and from inside, Kshs. 643,000/= which was kept in a safe.

21. Since PW2 stated that there were other shop the deceased operated, they her to Mitaboni. From there, they went back after dropping PW2 and prepared an incidence report. It was his evidence that the deceased had run receipts without actually paying though agents are instructed to pay using their own money.

22. According to PW5 The deceased had withdrawn Kshs. 2.1 Million for Mitaboni before the incident. He however was not aware how much the deceased and the Appellant had for that day

23. PW6, the Investigating Officer who was assigned the case commenced investigations and recorded statements. According to his investigations, on 24th December, 2016 the deceased had withdrawn Kshs. 1,660,000/= from Co-operative account, No. 01130071630201 Machakos Branch and he produced the transaction receipt and bank statement as EX 1(a) – (b). The deceased had also withdrawn Kshs. 630,000/= from KCB A/C No. 1150764343 Machakos Branch and he produced have a certified copy of customers' transaction voucher and bank statement which as EX 2 (a) – (b). The deceased had also withdrawn Kshs. 1,560,000/= from KCB A/C 1158482272 Machakos Branch and he produced the certified copy of customers' transaction voucher and bank statement as EX 3(a) – (b). According to him, the total amount was Kshs. 2,370,000/=. However, the Appellant only led the deceased's family to Kshs. 643,000/=. I arrested the Appellant and had him charged with the offence.

24. In his evidence, the said sum of Kshs 2,370,000/= was to be paid to the elderly. He however did not know the time the Appellant and the deceased left the bank though the accident happened at 10.00 a.m. According to him, the good Samaritan was the first to reach the scene and he took the cash and personal effects which he gave to the Appellant though it was reported that there were people who went to the scene.

25. Upon being placed on his defence, the Appellant testified that he was with his employer, the deceased in the same vehicle when the accident occurred. According to him, he was a phone repairer. Though aware of the charge facing him, he denied having committed the same.

26. In his judgement the learned trial magistrate found that based on the bank statements produced and the oral evidence, the amount that could not be accounted for was Kshs 1,727,000/- being the difference between the amount withdrawn and the amount recovered from the Appellant. It was found that the Appellant was aware that they had some money since he was the one who requested PW3 to retrieve the envelopes containing the money. Apart from the lady who was seen leaving the scene with the Appellant, no one else was mentioned in connection with the theft. According to the Court apart from merely denying that he stole the money the Appellant did not deny that he received three envelopes from PW3 who assisted him at the scene. According to the Court, the Appellant to whom the money was handed did not offer any explanation even for the money that was recovered from him. Even in his cross-examination, the Appellant did not challenge the evidence of the prosecution. The Court proceeded to convict the Appellant and laced him on probation for 3 years while ordering him to refund the stolen money.

27. Dissatisfied with the decision of the trial court, he appealed to this court challenging both the conviction and sentence of the trial court on the following grounds;

> **1) The trial magistrate erred in law and fact by convicting the appellant on the basis of the prosecution witnesses' evidence which was riddled with inconsistencies, gaps, contradictions and/ or discrepancies too glaring to sustain the charge facing the accused person (the appellant herein).**
>
> **2) The learned trial magistrate erred in law and in fact by shifting the burden of proof from the prosecution of proving the charge beyond reasonable doubt, to the accused to prove his innocence.**
>
> **3) The learned trial magistrate erred in law and fact by not finding that the integrity of the eye witnesses and others had been brought into question and their evidence was not credible.**
>
> **4) The trial magistrate findings and judgment were against the weight of the evidence on record.**
>
> **5) The trial magistrate erred in law and fact by meting out a sentence which was excessive in the circumstances of the case.**

28. In this appeal it was submitted on behalf of the Appellant that according to P.W.1, the deceased withdrew the sum of Kshs 2,190,000/= from two accounts. From one, she withdrew Kshs. 1,560,000/= and from the other, a sum of Kshs 630,000/=. P.W.6, testified that the deceased also withdrew another Kshs 1,660,000/= from Co-operative Bank, Machakos Branch. This adds up to Kshs 2,356,000/=. However, the sum allegedly recovered from the appellant was Kshs 643,000/= P.W.6 produced the transaction Receipt and the Bank statement from Co-operative Bank, which show that the sum withdrawn by the deceased was Kshs. 180,000.

29. It was submitted that the discrepancy in figures given by P.W.6 in his oral testimony and that in the exhibits aforesaid was never clarified, either by the prosecutor in re-examination or by the court itself. Again, the court in its judgement alluded to a figure of Kshs. 160,000/= as having been the sum withdrawn without bothering to establish whether these figures were as a result of a slip of the tongue on the part of P.W.6 or not and went ahead to rely on his evidence. While this finding could have been from the exhibits referred to above, which show the sum as Kshs. 180,000/=, it was submitted that it was erroneous for the court to fill in the gaps left open by the prosecution.

30. It was submitted that according to P.W.1 the money recovered from the appellant was from an envelope which was torn and the rest was naked/uncovered, yet this crucial witness, who released the money to the deceased at the K.C.B, did not suggest, let alone prove, that the money was put into envelopes, and if so, how many envelopes they were and how much each contained. Neither was there evidence on the part of prosecution of envelopes having been used to carry the money withdrawn from Co-operative Bank. Regarding the cash withdrawn from Co-operative Bank, not a single witness was called by the prosecution to testify on the same from the Bank, as it did with the K.C.B and no explanation for this either. All P.W.6 relied on were exhibits 1(a) and (b) which were essentially hearsay evidence because the makers were never called to testify and produce them and no application was made, and granted, to have them admitted without calling their makers, contrary to the relevant law of evidence.

31. It was submitted that while there are exemptions to the law of evidence requiring that documents be produced by their makers (Section 33 of the ***Evidence Act***), the prosecution did not attempt to bring itself within those exemptions. The requirement that the makers of the documents cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears to be unreasonable was far from being fulfilled in this case to make the evidence under attack admissible. The prosecution brought bank officials to court. The officials worked at banks within Machakos, a stone's throw from the trial court premises. They could be procured without unreasonable delay and expense. Certification alone, though done, did not cure the anomaly of tendering inadmissible evidence. According to the Appellant, the admission of the evidence itself was unlawful and it was a failure of justice.

32. In the Appellant's view, the issue of objection not have been raised by the appellant is neither here nor there. While the court should not lose sight of the fact that the appellant was unrepresented at the trial and would not reasonably be expected to know the relevant law relating to admissibility of documents, it should take judicial notice of the fact that both the prosecution and the learned trial magistrate know (or are deemed to know) the law. With or without the objection, they should have ensured that the law was complied with to the letter.

33. On the contention that the appellant did not show the court whether they spent the money with the deceased, it was submitted that firstly, that was not his duty and secondly, there is nothing to suggest, let alone prove, that the appellant was in control over the deceased in what she did or that they were constantly in the same company from the point at which the money was withdrawn and the time they embarked on the journey from Machakos to the accidents scene. By relying on this evidence to convict the appellant, the learned trial Magistrate was clearly in error.

34. According to the Appellant, there was no evidence on record to prove that all the money withdrawn by the deceased was carried by the deceased in the vehicle. Just a casual glance at exhibits 1(a) and (b) shows that the account at Co-operative Bank was opened in the name Nduku Kaloki Stationers of P.O. Box 1578, Machakos. Since P.W.2 (the deceased's mother) testified that the deceased had M-pesa shops at Machakos and Mitaboni it was submitted that in the absence of tangible evidence that she did not channel some of this money into the business at Machakos before departure to the accident scene, the court was left to assume that she had all the money she withdrew at the time of the accident and the court bought into this proposition which, it was submitted, was a gross error and a misdirection on the court's part.

35. Equally left for the court's assumption, it was submitted, was that the appellant was in the company of the deceased throughout her movements in Machakos, including when she withdrew the cash from the two banks, when she visited her business in Machakos town (if she did). Indeed, it is unclear from the evidence at what point in time the appellant joined the deceased in the car before the accident.

36. According to the Appellant, it is plainly clear that the appellant had no intention to steal the deceased's property. Based on the evidence of PW 1, it was submitted that it is difficult to see how the appellant could have intended to steal from the deceased when it was he who volunteered to hand over the items (including the cash) belonging to the deceased to her mother. And true to the appellant's words, the items were found in his house and he handed them over to the mother. He also accompanied the team to the bank where the money was counted and kept. All this time he was neither under arrest nor was he contemplating arrest or prosecution. The question that begs is, what "good thief" would have disclosed that he had recovered some of the money from someone who would never testify against him (the deceased), go ahead and surrender it. And not just a small amount but a whopping Kshs 630,000/=. According to the submissions, the Appellant actually suffered for his good actions, and this point is reinforced by the evidence of P.W.1 who said the two (appellant and deceased) had a very cordial relationship.

37. It was further submitted that the cash recovered (Kshs 643,000/=) was not placed before court and/or produced as an exhibit in the proceedings. All the court was told was that, it was in a safe in the Bank. No photographs of it and no documents from the bank were produced to back up that fact. According to the Appellant, it was erroneous to believe and rely on that bit of evidence as the learned magistrate can be said to have convicted the appellant on "non-existent" exhibits.

38. It was contended that whereas P.W.1 and P.W.2 were in the same company when they visited the appellant at Machakos Level 5 hospital, they gave inconsistent and contradictory evidence about the appellant's conduct, with P.W.1 saying that it is the appellant who volunteered to go and show them the recovered items while P.W 2 suggested that she coerced the appellant to do that. This, it was submitted was material contradiction and one is left to wonder why it was so yet the evidence is clear they were together when they confronted the appellant.

39. P.W 3, on whose evidence the court heavily relied, confirmed that the appellant was in fact injured. He was bleeding at the accident scene. When the said witness alleged he collected two envelopes from the vehicle and gave them to the appellant who had another one (to make them 3) he did not talk about the envelopes containing money, and if so, how much it was. Much as there is strong temptation to believe otherwise, it was submitted that assuming that P.W 3 actually collected the so-called envelopes, they were not money. He himself did not say there was any money in them, and if so, if he counted it to ascertain how much it was. It therefore follows that the only money the appellant was able to recover was the money in the torn envelope and some outside it, which the appellant and Faith (deceased's other employee) carried for safe custody and did not steal it.

40. It was submitted that evidence has it that there were many people at the scene of the accident. That means no one can rule out the possibility that the so-called good Samaritan and the other members of the crowd helped themselves to part of the money the deceased was carrying, besides what the appellant was able to salvage. This makes the issue as to what could have been in the vehicle even murkier.

41. According to the Appellant, the Kshs. 630,000/= voluntarily surrendered by the appellant after salvaging it from the accident vehicle should not have been part of the amount he was charged with stealing, even if the police were determined to prosecute the appellant at all costs. What remained should have been the subject of the charge, although it is still remains unclear as submitted.

42. Another misdirection, it was contended, was the finding that the presence of the appellant in the accident vehicle, the fact that the deceased had withdrawn some money which was in her possession at the time of accident and that the accused was given some envelopes by the so-called good Samaritan amounted to the same as saying the appellant had, in fact, stolen the cash he was alleged to have stolen. This was wrongful. And that, even if it was to be taken that the accused stole money, that the amount of Kshs 643,000/= recovered from him formed part of the stolen money, when the evidence was clear that this money was given by PW3 to the appellant and one Faith, an employee to the deceased, who took it to accused's house and later handed over to the deceased's mother. In the Appellant's submission, this piece of evidence does not point to theft on the part of the appellant or the said **Faith**, unless stealing gained another meaning.

43. According to the Appellant, the learned trial magistrate shifted the burden of proof to the Appellant by finding that the appellant did not, through cross-examination, challenge the evidence by the prosecution that he did not steal the moneys and that he was not able to dislodge the evidence of PW3 and PW7. It was contended that it is trite is the law that it is the prosecution's duty to prove its case against an accused in the criminal justice system, and this burden never shifts except in certain cases when there is exception to that rule under the relevant law of evidence. Accordingly, the court was in a gross error and misdirected himself on the issue of burden of proof.

44. The Court was to look at the evidence of the witnesses and find that it was poked with holes on key aspects of the case, namely;

a. whether all the money withdrawn by the deceased was in the car at the time of the accident or some had been spent at the business at Machakos or otherwise;

b. if the money was in envelopes as suggested by PW 2, PW 3 and PW4 and if so, how much was in the envelopes and

c. if PW3 himself and other members of the crowd who went to the accident scene could not have helped themselves to some of the money.

45. The Appellant's case was that based on the foregoing submissions, the findings and judgement were not enough for a conviction. In fact, the evidence did not support the charge, which states that the stolen money belonged to the deceased, while PW1, the banker, whose evidence was critical (and the court treated it as such) stated in no unclear terms that *"the money was not Catherine's, neither was it the banks, it was for the older persons"*. The same witness said that they sent for the appellant to go explain what happened to the money and the machines, and also to do an affidavit, which he did. That clearly takes away any treatment of the appellant as a suspect, but as a person to aid them in establishing the truth of what transpired.

46. Then there was the evidence of PW2, the deceased's mother, that 'accidentally' let the cat out of the bag in as far as the reasons she pressed charges against the appellant is concerned, this being that, to quote her, *"KCB is demanding some more money from me"*. This shows that there was either an intended cover up on the part of the bank, whose sacrificial lamb was the appellant, or the appellant was being charged to forestall the demands for more money by the bank to PW2. In other words, the criminal trial was not brought in good faith but was in pursuit of ulterior motives. This submission is reinforced by the long time taken by the police to come into the picture and the accused to be arrested and arraigned.

47. As for the sentence, it was submitted that the same was excessive in the circumstances of the case. According to the Appellant, the circumstances under which the accident occurred and the aftermath were themselves mitigating in nature. The accused himself sustained injuries which even required x-rays to be taken, meaning he was in untold trauma. He himself offered to disclose that there was some recovered money (thus becoming a good Samaritan) and went ahead to surrender it. Given the totality of these factors, coupled with the fact that he was a first offender as conceded by the prosecution, the court ought to have meted a leaner sentence. It was urged that should the conviction stand, this Court should intervene and indeed interfere with the sentence by reducing the same to a reasonable one.

48. Based on the foregoing, it was sought that this court allows the appeal, quashes the conviction and set aside the sentence or considerably reduces the same.

Respondent's Submissions

49. On behalf of the Respondent reliance was placed on ***Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14: 13*** *for the position that:*

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose."***

50. It was therefore submitted that the burden of proof in criminal cases lies on the prosecution this law is consistent with and upholds the constitutional right of the accused; presumption of innocence, not to give incriminating evidence and to remain silent and the Respondent relied on **Woolmington vs. DPP [1935] A.C 462 pp 481.**

51. In this case, it was submitted that the burden of proof lay with the prosecution to prove that it was the Appellant herein who committed the offence of stealing and in so doing the prosecution called a total of six witnesses. The Respondent identified the ingredients of the offence of stealing as including;

a) Whether on the 24th December 2016 at Mutituni area a sum of Kshs 2,370,000/= belonging to Catherine Nduku Kaloki (deceased) was stolen.

b) If the said sum of money were stolen, who was responsible.

c) Whether there are any doubts created in favour of the Appellant.

52. In opposing the appeal, the Respondent reproduced the prosecution's case as narrated by PW1 and PW3. According to the Respondent, it was the evidence of PW3 the eye witness that he went to the scene when he heard a crash. He testified that he lives near the road and he was the one who rescued the Appellant from the car after the road accident. He further testified that he retrieved three envelops under the instructions of the appellant and gave them to him then the accused made a phone call to someone. He added that a lady later came with a car then the appellant gave her the money then they left the scene. The branch manager and the mother to the deceased testified that the appellant only handed them one envelope which had a total of Kshs 643,000/= which they kept in a safe custody. The branch manager PW1 testified that the deceased had two accounts and had withdrawn Kshs 2,190,000/= and identified the bank statements from the two accounts as MFI 1 and MFI2. PW 6 the investigating officer, testified that the deceased had withdrew Kshs 2,370,000/= from three various accounts which was corroborated by her mother that the deceased had three accounts, KCB, Cooperative Bank and Post Bank. Pw6 further testified that from A/C 01100071630201 the deceased had withdrawn Kshs 160,000/= EX1 (a-b), from KCB A/C No. 1156764343 Kshs 630,000/= EX 2(a-b) and from A/C No 1158482272 had withdrawn Kshs 1,560,000/= Ex 3(a-b) making a total of Kshs 2,370,000/=.

53. From the above, it was submitted that the first ingredient was clearly proved by the prosecution.

54. Onto the second ingredient on who was responsible for the lost amount, it was submitted that the prosecution proved that it was the appellant through the evidence of the eye witness PW3. In his evidence, PW3 testified that he was the first person to arrive at the scene of the accident and helped the appellant herein to get out of the wreckage. He added that, the appellant asked him to get three envelops from the car as they were carrying money in the car. He further pointed to PW3 the location of the money and he hand the envelopes to him. He further testified that the Appellant left the scene with a lady in a salon car after the lady took a hand bag and a sweater which they used to wrap the two envelops. The appellant knew that the deceased had money in the car and pointed exactly where PW3 would get it. The appellant neither denied that he was at the scene of the accident nor did he deny the evidence of PW3 that he was given the three envelops that had money. Further he did not deny that he was the one in possession of Kshs 643,000/= which was part of the stolen money. It was the evidence of PW2 that the appellant only gave her the money after further inquiry since he had denied having been given any money by PW3.

55. In light the above, it was the Respondent's case that the prosecution proved that, as the appellant was placed at the scene of the accident, the stolen money was found in his possession, he did not offer an explanation as to the source of money recovered from him and why he fled the scene.

56. Onto the third issue whether there was any doubt created in favour of the appellant, it was submitted that the court noted that the prosecution had discharged its burden of proof that it was indeed the appellant herein who committed the offence. The fact that the court in its judgment noted that the accused did not challenge the evidence of the prosecution did not mean that it shifted the burden of prosecution from the prosecution to the appellant. This was a mere observation that there was no doubt created by the accused to challenge the prosecution as he only denied the offence but confirmed that he was with the deceased and in the same vehicle when accident happened.

57. As for the inconsistencies and contradictions, the while conceding that there were minor discrepancies in the evidence of the witnesses, took the view that such minor discrepancies are common and contended that whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. In this regard the Respondent relied on the case of **Njuki vs. Rep 2002 1 KLR 77**.

58. It was noted that PW1 only testified of the amount he was aware that the deceased was handling that day while PW6 the investigating officer testified on the amounts missing upon investigation and conclusion of his investigation. The charge against the appellant was on the stolen money not the one recovered from him and this was proved through the bank statements produced in court. On the issue of PW3 not counting the money, he did not have a duty to count the money from the vehicle he only gave the appellant the money as he was instructed. The other members of public arrived later after the appellant had fled the scene after taking the money.

59. On issue of marked exhibits, it was submitted that during the trial the production of the statements as exhibits was not objected to by the accused and reliance was placed on Section 77 of the ***Evidence Act*** and **Republic –vs- Rono Khalif Ahmed [2015] eKLR** and **Naomi Bonari Angasa - vs- Republic [2018] eKLR**.

60. According to the Respondent, Section 33 clearly gives leeway for the production of documents/expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. From the evidence in court, the investigating officer was in a position to produce the documents in court, the documents were certified according to law. It was not demonstrated on behalf of the appellant how the production of the bank statements as exhibits could possibly have occasioned failure justice and in any event no objection was taken on the production of this document at the earliest opportunity possible. No objection was taken during or at any stage of the trial or subsequently to either the reference to the exhibits by the witnesses or to the production of the exhibits as evidence.

61. As for the contention that PW3 could have helped himself to the stolen cash together with other members of the public, it was submitted that it was the evidence of PW3 that he was the first person at the scene and rescued the appellant and that the appellant left even before other people could get to the scene and before the police arrived at the scene. From the evidence it was only the appellant and the deceased who knew that there was money in the vehicle. PW3 could not have known if there was any money in the car. He testified that the appellant pointed him to where the money and he saw a torn envelope containing money and handed it over to the same Appellant. The appellant then called a lady and they took all the envelops in the car then left the scene which the appellant did not deny even when he was placed on his defence. He did not deny that he was found with money and that he was at the scene and that PW3 helped him from the wreckage and gave

him the money from the car.

62. It was submitted that the duty of prosecution was to prove the amount stolen which they did by providing the evidence that the deceased had withdrawn a total of Kshs. 2,370,000/= which it did through exhibits 1 and 2 produced by PW6. The appellant herein was the only one in the vehicle with the deceased which he confirmed. He did not show the court whether they had spent the money with the deceased. He did not cast doubt when put on his defence. Further, PW3 did not know the appellant or have any grudge against him to fabricate the evidence against him. He only went to the scene and rescued the appellant and did what the appellant asked. He did not have a reason to lie to the court even during cross examination, the witness remained firm that he helped the appellant and further described how he did it. In this regard the Respondent relied on the case of **Ayub Muchele vs. The Republic [1980] KLR 44.**

63. It was submitted that PW3 did not have a reason to lie to the court about the appellant, he only met him at the scene and helped him then later police went looking for him at his construction site to record his statement on what transpired that day.

64. Responding to the allegations that the findings and judgment were against the weight of the evidence, in that the evidence did not support the charge that the money belonged to the deceased, it was submitted that the money was in the possession of the deceased before she passed on. She was the one responsible for the money till she disposed it to the elderly and various dependents. The charge was that the appellant jointly with another stole from the deceased. From the evidence of PW2 the deceased also had Mpesa outlet businesses which she used to run and the appellant was her employee. The appellant did not dispute hence the money in question was well accounted by the evidence of all the witnesses brought in court. The charge was well framed, evidence presented in court and the matter concluded till conviction. The evidence tendered in court and the exhibits produced supported the charge.

65. As for the sentence, the Respondent cited the case of **Wanjema vs. R (1971) KLR 493**, 494 and relied on the definition of the offence of stealing under Section 268 ***Penal Code*** and the sentence under Section 275 ***Penal Code***.

66. According to the Respondent, from Section 275 ***Penal Code***, a person found guilty of the said offence shall be liable to three years imprisonment. The trial court considered the mitigation of the appellant and further went to request for probation report before sentencing him. The court then sentenced the appellant to probation for 3 years and to refund the stolen money. The court substituted the three years imprisonment to three years' probation which is non-custodial sentence which was fair and the money stolen to be refunded. Reliance was placed on **Ogolla s/o Owuor (1954) EACA 270**.

67. In the Respondent's view, the trial court took into account the nature of the charges facing the Appellant. It also considered the Appellant's mitigation. The sentence imposed on the Appellant cannot be said to be harsh or excessive in the circumstances. From the above the appellant has not raised any sufficient reason as to warrant this court to interfere with the sentence pronounced by the learned trial magistrate. It is clear to this court that the trial court did not commit an error of principle or fail to take into consideration a relevant factor when it sentenced the Applicant to serve the sentence that was imposed.

68. The Respondent therefore submitted that the Appellant has not raised sufficient grounds to warrant this court to interfere with the discretion exercised by the trial court. It was therefore prayed that this appeal be dismissed and the court to uphold both the conviction and sentence of the trial court.

Determination

69. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

70. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

71. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

72. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

73. However as held by **Mativo, J** in **Sylvester Wanjau Kariuki vs. Republic [2016] eKLR**, a decision in which he cited the decision of the Supreme Court of India in **K. Anbazhagan vs. State of Karnataka and Others Criminal Appeal No. 637 of 2015:-**

> **"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."**

74. In this case the prosecution's case is that on 24th December, 2016, an accident occurred in which the deceased herein lost her life. The deceased, an agent for KCB and who also operated Mpesa outlets in Machakos, Mitaboni and Tala was engaged by the Bank as its agent for paying money to the elderly members of the society through mobile money transaction. According to PW1 on that day, she had withdrawn a total of Kshs 2,190,000/-. After the accident, PW3 who rushed to the scene assisted the Appellant who was with the deceased in the vehicle out of the vehicle. In the process, PW3 saw a torn envelope containing money and drew the Appellant's attention to it who disclosed that they were carrying money and directed PW3 to retrieve two other envelops which PW3 did and handed over the same and other items to the Appellant. Upon the receipt of the said three envelops and the said items, the Appellant made a call and was picked up by a lady and the duo drove off the lady having been handed over the items by the Appellant.

75. When the information of the accident was relayed to PW1, the then Branch Manager, he proceeded to the scene and failing to find either the deceased or the Appellant he proceeded to the Hospital where the Appellant was receiving treatment. At the Hospital, he found the deceased's mother PW2. The Appellant then disclosed that there were items recovered from the scene that he wanted handed over to PW2. In the company of PW2 they proceeded to the Appellant's house where the Appellant handed over some items including a sum of money in a torn envelope which amounted to Kshs 643,000/= which was eventually kept in a safe at the Bank.

76. According to PW2, the Appellant initially denied that he had seen any money and it was only after prodding that he admitted having recovered one envelope which he eventually handed over to PW2.

77. From the evidence on record, it is clear that there was inconsistency between the evidence of PW1 and PW2 as regards the conduct of the Appellant. While PW1's evidence that was that the Appellant voluntarily disclosed that he had recovered some items including money from the scene, PW2's evidence was that initially the Appellant denied knowledge of any money. If PW2's evidence was intended to show that the conduct of the Appellant was not consistent with that of an honest person, then it was dislodged by that of PW1. Accordingly, the evidence of PW2 cannot be a basis for finding any wrong doing on the part of the Appellant since the evidence of PW1 does not portray the Appellant was a person whose conduct was consistent with that of a guilty person. The corollary of the evidence against the accused person may well be interpreted that having just been at the shop of the deceased and having known that they had been clearly recognized, it was unusual for them to attack the deceased. In **David Merita Gichuhi vs. Republic Nairobi Criminal Appeal No. 158 of 2003** the Court of Appeal held that:

> **"It is incredible that the appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to the home of the deceased on the night on 18th April, 1999 when Bakari met him…Lastly, Njambi (PW10) testified that she is the one who told the appellant about the death of Elizabeth Naymbura on 21/4/99 and that the appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the appellant had indeed committed the crime charged and had in fact seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18th April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to console the family and even slept there is another co-existing circumstance which destroys any inference that he was the one who committed the offence. On our evaluation of the evidence we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so weak as to amount to a mere suspicion and could not have been a sound basis for a conviction."**

78. In this case, the conduct of the Appellant based on the evidence of PW1, was clearly incompatible with the conduct of a guilty person.

79. However, PW3 testified that when he drew the Appellant's attention to the envelope containing the money, the Appellant requested him

to retrieve two others which he did together with other items. From the evidence of PW3, it was intended to prove that the Appellant must have been aware that there was more money in the other envelopes which he took possession of but did not disclose.

80. However, the evidence adduced by PW3 coupled with that of PW1 only proved that the deceased withdrew Kshs 2,190,000/- and was involved in an accident in the company of the Appellant. Where she went to after withdrawing the money is not known and there is no evidence that she was accompanied by the Appellant when she was carrying out the transaction. There is evidence that the deceased operated a business outlet in Machakos and in other areas. There is no evidence that the money withdrawn was intact at the time of the accident. It may well be that the Appellant received three envelopes instead of one from PW3 but the contents of the said envelopes is and was unknown to the trial Court. Whereas it may well be true that assuming three envelopes were recovered and only one was revealed by the Appellant, suspicion was thereby created that the other undisclosed envelopes contained the balance of the missing money, such suspicion is not sufficient in the circumstances of this case where there is no evidence that the amount withdrawn was intact at the time of the accident.

81. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

82. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

83. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> "**The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

84. In 1997, the Supreme Court of Canada in **R vs. Lifchus [1997] 3SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

85. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

86. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's**

guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

87. It may well be that the previous conduct of the 1st accused coupled with the fact that immediately prior to the attack on the deceased, the 1st accused was seen in the premises of the deceased raised a suspicion that it must be the 1st accused who inflicted the fatal injuries on the deceased. However, in **Sawe vs. Rep [2003] KLR 364** the Court of Appeal held:

"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

88. The Learned Trial Magistrate seemed to have been of the view the Appellant ought to have proffered some explanation in his evidence as to the whereabouts of the other envelopes. The law however is that even where the accused decides not to adduce any evidence, the burden is not lessened by that mere fact. This was the position of the Court of Appeal in the case of **Dorcas Jemutai Sang vs. Republic [2018] eKLR** where was faced with a similar case where the complaint by the Appellant was that the trial court and first appellate court had placed the burden of proof upon her to prove her innocence, the court stated as follows:

"In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:

"…did not call witness to support her defence,"

and the learned Judge remarked that:

"…it was a significant fact that the appellant did not call …any witness at the trial."

By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground."

89. In my view the evidence adduced by the Prosecution did not meet the threshold that the Appellant stole the amount of money with which he was charged.

90. Accordingly, I find merit in this appeal, set aside his conviction and quash the sentence imposed on him.

91. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 14th day of January, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muithya for the Appellant

Ms Njeru for the Respondent

CA Geoffrey