



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CRIMINAL APPEAL NO. 18 OF 2019**

**STEPHEN KIOKO MULI.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of Hon. D. Wangeci Adet, Principal Magistrate, delivered on 1<sup>st</sup> December 2019 in Voi Principal Magistrate's Court Criminal Case No. 499 of 2016).*

**J U D G M E N T**

1. Stephen Kioko Muli was sentenced to serve 7 years' imprisonment in each of the 7 counts for which he was found guilty and convicted in Voi Senior Principal Magistrate Court CR. Case No. 499 of 2016.
2. The Appellant was charged with the offence of stealing by servant contrary to Section 268(1) as read with Section 281 of the penal code in Count 1. Particulars to Count 1 were that Stephen Kioko Muli on diverse dates between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank, Voi Branch in Voi within Taita Taveta County jointly with others not before Court being a business Banker at the said bank stole Kshs. 2,900,000/= (two million, nine hundred thousand shillings only) the property of Co-operative Bank Ltd which came into his possession by virtue of his employment.
3. In Count II, the Appellant was charged with offence of conspiracy to commit a felony contrary to Section 393 of the penal code. The particulars were that Stephen Kioko Muli on diverse dated between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank Voi Branch in Voi Town within Taita County jointly with others not before court conspired to steal Kshs. 500,000/= from account no. xxxx domiciled in Co-operative Bank Voi in the name of Elvis Mwasanu.
4. In Count III, particulars are that on diverse dates between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank Voi Branch in Voi Town within Taita County, jointly with others not before court conspired to steal Kshs. 450,000/= from A/C No. xxxx in the name of Mary Ann Akinyi Owino.
5. In Count IV, the particulars were that the Appellant on diverse dates between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank Voi Branch in Voi Town within Taita County jointly with others not before court conspired to steal Kshs. 500,000/= from A/C No. xxxx domiciled in Co-operative bank Voi in the name of Benjamin Mutanbu Mainga.
6. In Count V, the particulars were that Stephen Kioko Muli on diverse dates between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank Voi Branch in Voi Town within Taita County jointly with others not before court conspired to steal Kshs. 450,000/= from A/C No. xxxx domiciled in Co-operative Bank Voi in the name of Varlyne Kemunto Omar.
7. In Count VI, Stephen Kioko Muli was charged that on diverse dates between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank Voi Branch in Voi Town within Taita County jointly with others not before court conspired to steal Kshs. 500,000/= from A/C No. xxxx domiciled in Co-operative Bank Voi in the name of Irene Kwamboka Bwendu.
8. Particulars to Count VII were that Stephen Kioko Muli on diverse dates between 3<sup>rd</sup> June 2015 and 6<sup>th</sup> August 2015 at Co-operative Bank Voi Branch in Voi Town within Taita County jointly with others not before Court conspired to steal Kshs. 500,000/= from A/C No. xxxx domiciled in Co-operative bank Voi in the name of Onesmus Kimana Charangui.
9. The Appellant was aggrieved by the conviction and sentence and he lodged petition of appeal dated 11<sup>th</sup> day of December 2019 on the following grounds: -

- a) That the learned trial Magistrate erred in law & fact in convicting the Appellant on count of stealing by servant when there was no evidence to that effect.
- b) The learned trial Magistrate erred in law and fact in finding that the accused conspired with the 6 account holders to steal when the evidence tendered was purely circumstantial.
- c) The learned trial Magistrate erred in law & fact in convicting the accused of stealing without calling the account holders or the referees who were persons with account at Co-operative Bank.
- d) The learned Magistrate erred in law & fact for sentencing the Appellant to the maximum of the sentence provided for under the law hence the sentence is harsh.
- e) The learned Magistrate erred in law & fact by not considering the Appellant's strong statement of defence.

10. The Appellant prayed that the conviction and sentence be quashed and he should be set free forthwith.

11. The prosecution case in the lower court was that the Appellant was a Business Banker at Co-operative Bank Voi Branch where he did marketing for the bank and also processed loans to clients. That he could go to the field market the bank and on getting clients issue them with forms to fill to open accounts and upon certifying a copy of the client's ID Card bring the same to the bank. It was the prosecution's case that the Appellant presented 3 such forms duly filled to PW 1- Service Desk, an officer at the bank on the 3<sup>rd</sup> July 2015.

12. The account opening forms were in triplicate and were in respect to Mary Ann Akinyi Owino, Elias Mwasaru Mkungo and Benjamin Mutangu Mainga – EXP 1(a) (b) (c) & (d); EXP 2(a) to (d) & EXP 3(a) (d). That when PW 1 confirmed the forms had been properly filled she opened the discounts. PW 1 said the Appellant went to the field for marketing in a representative capacity and had a duty to confirm the identity card presented was for the customer he was talking to and also take passport photograph to be uploaded to the system while opening account.

13. PW 1 said the Appellant again took to her 3 account opening forms for Onesmus Kimani Charagu certified copy of ID Card on 7<sup>th</sup> July 2015 on the same day she received account opening form for Irene Kwamboka and Varlyne Kemunto Omar together with respectively certified copies of identity cards of the clients and she opened the accounts. PW 1 in cross examination said she was familiar with the Appellant's signature and it was in the forms he presented to her to open accounts. She said that after she opened the accounts she only came to hear about them in August when she was called by security team.

14. PW 2 testified that the Appellant joined Co-operative Bank Voi Branch in August 2013 as a Business Banker and his work was to look for clients and issue loans. He testified that on 18<sup>th</sup> June 2015 the Appellant went to him with ID Card OF Elias Mwasaru Mkungo holder of A/C No. xxxx ID No. xxxx and requested for a withdrawal of Kshs. 240,000/= for the customer whom the Appellant said was at his desk. He said from the system he was able to tell the customer had applied for a loan which was disbursed to the account. He said he trusted the Appellant and he gave him the money. That he printed the slip and gave the Appellant to take to the customer at his desk to sign and he complied and returned a duly signed slip.

15. That on 20/6/2015 Appellant again went to PW 2 with withdrawal slip for Kshs. 240,000/= A/C No. xxxx and he gave him the money. For both 18/6/2015 and 20/6/2015 CCTV footage captured the Appellant in PW 2's workstation and when he was receiving money from PW 2. On 23/6/2015 again Appellant presented withdrawal slip in the name of Mary Ann Akinyi Owino for Kshs. 260,000/= and CCTV footage was produced showing Appellant standing behind PW 2 in his workstation waiting for the money and the same is shown being given to him. The same thing was repeated on 24/6/2015 when Appellant presented withdrawal slip for Mary Ann Akinyi Owino for withdrawal of Kshs. 165,000/= for the customer whom he said was at his desk.

16. On 26/6/2015, a similar withdrawal slip was presented by the Appellant in respect to Benjamin Mutambu Maingi for Kshs. 240,000/= and Appellant received the money. PW 2 said the loan in the said accounts were processed by the Appellant & he gave him the money. On 3/7/2015, the Appellant presented withdrawal slip for withdrawal of Kshs. 230,000/= by Benjamin Mutambu Maingi. In total the Appellant is said to have presented other withdrawal slips on 3/7/2015 for Varlyne Kemunto for Kshs. 188,000/=; On 29/7/2015 withdrawal slip for Kshs. 275,000/= for Irene Kwamboka Birundu; On 4/8/2015, the Appellant presented withdrawal slip for Kshs. 200,000/= together with identify card of Irene Kwamboka as well as withdrawal slip of Kshs. 275,000/= for Onesmus holder of A/C No. xxxxx & gave the money to the Appellant.

17. That on 6/8/2015 another withdrawal slip was presented for Kshs. 201000/= in respect to account held by Onesmus Kimana and same was paid through the Appellant. PW 2 said that all the transactions loans had been processed by the accused into haba na haba accounts. That when he was interrogated in September 2015, it found when the Appellant had absconded duties in August 2015. He informed the security officer that it is the Business Banker who presented the custom request for payment and he recorded a statement with BFIU Mombasa branch. He said he was interdicted, suspended and later sacked. He said the branch Manager was also sacked. In cross examination PW 2 said the Appellant went to his workstation with withdrawal forms duly filled and gave him the ID Card of the account holders and based on trust he processed the withdrawals and gave the money to the Appellant.

18. He said the Appellant always went to his work station with original ID Cards that Matched the details in the system. He said the Appellant indicated the clients were at his desk and that he gave out the money to him. He said that EXP 1 (a) dated 23.6.2015 showed him handing over an envelope to the Appellant. PW 2 said he paid the customers without seeing them. He said the amounts released were loans processed by the Appellant. He said he had not paid any other staff on behalf of their customers who had processed any customers' loans.

19. PW 3 also received duly filled M-Coop cash application forms from the Appellant on 4/6/2015 for Elias Mwasaru A/C No. xxxx and Maurine Wakuthii Wachira. She said the copies of identify cards were certified by the Appellant. That when she tried to call back the

clients to confirm their telephone numbers in order to link the M-Coop cash to their accounts the numbers didn't go through & she didn't register them. That she put the forms in her tray with a note that they are marketed accounts and that the numbers were not going through and she proceeded on leave. She said the transactions presented by the Appellant turned out fishy. She said it was Appellant who would have been answerable for the mistakes in the client's account opening forms.

20. PW 4 Darius Kiseo Mwamburi was the Branch Manager Co-operative Bank Voi branch during the period when the offence herein was committed. He said that on 12/8/2015 he received a call from a colleague known as Nduati from Head office who deals with loans recovery. That Nduati called in regard to loan accounts which were in arrears. The accounts were: -

- i. A/C No. xxxx in the name of Benjamin Mutambu and loan A/C No. xxxx.
- ii. A/C No. xxxx and loan A/C No. 016F xxxx held by Mary Ann Akinyi Owino.
- iii. A/C No. xxxx and loan A/C No. xxxx in the name of Elias Mwasaru.

21. PW 4 said that when the account holders were called the calls were not going through. He said he established that all the accounts were opened when the Appellant marketed the bank and he also processed the loans. He said although loan accounts are opened at the Headquarter these particular ones were opened at the Voi branch when the Appellant the Micro-Credit officer looked for the customers and facilitated the opening of the accounts at the branch.

22. That upon learning of the default of loan repayment by customers who were introduced to the bank by the Appellant, PW 4 immediately called the Appellant who was out for lunch but the Appellant decided to go and look for the customers. That the Appellant reported that the customers had closed their businesses and were not traced. That Appellant sought to be given some off duty as he was stressed but PW 4 refused. The following day the Appellant sent a text saying he was unwell and was going to see a doctor before he could go to work. That the Appellant's phone was not going through and he never went back to work and PW 4 was seeing him in court for the 1<sup>st</sup> time since he disappeared on 12/8/2015.

23. PW 4 retrieved the suspect files and found that they didn't have the required bank statements and ID Cards. PW 4 said he declined to give the Appellant leave due to the complaint. That in the Appellant's drawer there were 23 copies of different identity cards including 3 that were related to accounts that had been opened fraudulently for Elias Mwasaru Mkungu, Benjamin Mutambu Mainga and Mary Anne Akinyi which were opened on 3/6/2015. PW 4 said that one staff Frank Wambua accompanied him to go and trace the customers but it was established that the maps drawn by the Appellant showing location of the customers' businesses never existed. PW 4 also learnt from a staff who stayed near the Appellant's residence who confirmed that the Appellant was not home. PW 4 said that he relied on the Appellant's know your customer for approval the loans advanced to the fraudulent accounts. He said the Appellant was a staff and he didn't suspect foul play.

24. PW 4 said that he reported fraud to security department at the HQ and Mr. Mwamuti asked him to check CCTV footage and confirm if payments were made to customers. He said that in all payments made, the Appellant was in the cubicle of PW 1 who made the payments. Statements for accounts showing withdrawal were produced as EXP 30, 31, 32, 33 & 34. He said that PW 1 was terminated as a result of the fraudulent withdrawals. He said that all the withdrawals were under limit and his approval was not required before payment and that is why PW1 made payments without his knowledge. PW 4 said that it was alleged he was not diligent in his duties and he was sacked.

25. PW 4 said he did not approve the withdrawals. He said that he signed the loan application after the borrower and the Appellant had signed. He said the applications were forwarded to head office for disbursement to respective accounts. PW 4 said that the Appellant didn't pressurize him to approve loan as they seek approval via the system from the headquarters for loans. He said the Appellant had a duty to sell loans & source for referring clients and prepare all documentations. He said the Appellant knew all that was required and he authorized the documents. He said he never saw any of the clients and as applications were proper, he gave authorization. He said he didn't interrogate the cashier to know if he colluded with the Appellant.

26. PW 5 David Wamuti security officer at complainant Bank HQ testified that his duties are to carry out internal investigations and ensuring safety of bank staff and assets. He testified that he investigated three loans given at Voi branch which were suspected to be fraudulent. The loans were in respect to Benjamin Mutambu Mainga who was advanced Kshs. 500,000/= on 18/6/2015; Elias Mwasaru Mkungu who was advanced Kshs. 500,000/=. On 5/6/2015 and Mary Ann Akinyi Owino who was advanced Kshs. 450,000/= on 15/6/2015. He said that upon the loans being disbursed to respective accounts withdrawals were made by same Teller namely Leonard Kirui – PW2. It was also established that it is the Appellant who presented the account opening documents to PW 1. PW 5 said in the course of investigations PW 4 informed PW 5 that other suspicious accounts in the names of Onesmus Kimana Charagu, Irene Kwamboka and Varlyne Kemunto Omaye had also been opened and loans of Kshs. 500,000/= disbursed into each of the 3 accounts on 9<sup>th</sup>, 15<sup>th</sup> and 8<sup>th</sup> of July 2015 respectively.

27. It was established that the Appellant interviewed the clients and sold the loans to them. That they only found loan file in respect of Elias Mwasaru with scanty documents. The documents used to raise the Loan, customer's Identity Cards were not in the file. That for the other 3 loans no documents were traced. PW 5 also testified that the telephone contacts of the customers were also not going through. He visited places indicated as customer's residents and they were unknown in those places. PW 5 said that upon interrogating PW 2 who made the payments he said that he paid the monies to Appellant and CCTV footage for the relevant time showed the Appellant at PW 1's cubicle – EXP. 9(a), EXP 7(a), EXP 8(a), 9(a), 11(a), 12(a) –(c). PW 5 said the loans were un-procedurally processed and paid as the customers were never in the bank and they didn't provide bank statements for 3 months.

28. He said it was suspected telephone contacts for Benjamin Mutambu – 0728xxxx, Mary Ann Akinyi 0728-xxxx and Elias Mwasaru 0728xxxx all bore close relations & May have been registered at the same place. PW 5 said that at the time he went to Co-operative Bank Voi Branch the Appellant was absent as he had absconded and was not reachable through phone and was not at his Voi residence. PW 5 reported matter to Banking Fraud Investigations Unit and later Appellant was arrested and charged. He said PW 2-Teller and PW 4 Bank Manager were dismissed following this fraud. PW 5 said the Appellant sold accounts certified copies of identity cards and together with

account opening application forms duly filled presented to PW 1 to open. He said it is Appellant who appraised the alleged customers and processed loans for those qualified.

29. He said for customers who had not banked with the bank for 3 months even loans below Kshs. 500,000/= go to head office for final approval. PW 5 said that each Business Banker is responsible for the documents/files for which loans he has sold and the ones in question must have disappeared after the Manager signed.

30. PW 6 Document Examiner Muchira Ndege examined questioned documents A1 to A20 and compared to specimen handwriting and signatures of the Appellant B1 to B15 and concluded that they were by the same author. He produced Document Examiners Report as EXP 36. He said he did forensic analysis of the specimen handwriting and signatures and the questioned handwritings and signatures.

31. PW 7 Corporal Naftali Kinyua of Central Bank Mombasa investigated the offence herein. He said his boss Chief Inspector Paul Abuto called him and gave him a letter written by Co-operative Bank referring to fraudulent loans granted to some persons who held accounts with the bank namely: -

- i. Elias Mwasaru A/C No. xxxx
- ii. Mary Ann Akinyi Owino A/C. No. xxxx
- iii. Varlyne Kemunto Omaywo A/C No.xxxx
- iv. Benjamin Mutambu Mainga A/C No. xxxx
- v. Irene Kwamboka Mburundi A/C No. xxxx
- vi. Onesmus Kimana Charagu A/C No. xxxx

32. PW 7 said the total amount loaned to the 6 people was Kshs.2.9m. PW 7 travelled to Voi to meet branch Manager Co-operative Bank. Mr. Mwamburi – PW 4 who told him that the accounts to which loans had been disbursed appeared fraudulent as the loans were not being serviced. He learnt that the Appellant was the one nominated all the loans that were not being serviced and that he had gone underground when the issue was raised. PW 7 said that he learnt all the withdrawals of the loan monies were processed by PW 2 – Leonard Kintai and he interviewed him. PW 7 obtained documents related to the 6 suspect accounts i.e. account opening documents in triplicate; 3 letters of offer for the loans which were verified by the Appellant; bank statement withdrawal slips and CCTV footage which captured the Appellant at PW 2's work station during the occasion that money was fraudulently withdrawn from the fictitious accounts.

33. PW 7 recorded statements of PW 1, PW 2, PW 3 and PW 4. PW 7 said that he did arrest PW 2 who told him that the customers from whose accounts money was withdrawn were at Appellant's desk when the Appellant went with withdrawal slips to request for withdrawals. He said that Appellant was arrested at Meli-Kubwa along Mombasa-Nairobi Highway by Officers from Mackinnon Police Station and he was charged. That by a letter dated 23/9/2016 from DPP, PW 2 was made a prosecution witness. PW 7 said that specimen signatures and handwriting by Appellant were taken and forwarded for examination together with questioned document and a report was received confirming that the questioned signatures and handwritings were made by the same hand as the specimen signatures and handwritings of the Appellant.

34. PW 7 said he tried to trace the whereabouts of the 6 account holders with support of Registrar of persons but did not succeed. That their phones were not also going through. PW 7 said it is Appellant who opened the fictitious accounts and secured the loans fraudulently for his own benefit. That on arrest Appellant was interrogated but he did not explain how he came by the 6 alleged customers. In cross examination, PW 7 said that he had charged PW 2 jointly with the Appellant but PW 2 was discharged and made a witness

## **SUBMISSIONS**

35. This appeal was canvassed by way of written submissions. The Respondent submitted that the record reflected a very well laid down plot by the Appellant & others not before court to steal from the complainant bank through fictitious accounts that the Appellant misrepresent to his employer as genuine accounts and actually borrowed against them.

36. It was submitted that the Appellant personally presented requisite withdrawal documents to PW 2 and based on bonafide trust and without cause to doubt his colleague, PW 2 handed over the money to the Appellant. It was submitted that the evidence of the 7 prosecution witnesses was cogent, consistent and corroborative and supported the charges against the Appellant. The Respondent also argued that it was not in dispute that the Appellant was an employee of the complainant bank and the element of stealing was proved by overwhelming evidence adduced by the 7 witnesses. It was further submitted that the Appellant presented account opening documents for the 6 accounts which he later used to process loans which were disbursed into the fictitious accounts from where he presented withdrawal slips to PW 2 and the money handed over to him on behalf of the fictitious clients.

37. It was argued that it was not a mere coincidence that Appellant who processed the opening of the accounts and processed loans was also the one who presented withdrawal slips for the withdrawal of the money and not the clients themselves. It was contended that the Appellant never offered an explanation how he came by the original identity cards for the 6 account holders and therefore was not able to rebut the watertight evidence that he used the said identity cards to open fictitious accounts and the trial Magistrate said as much when she said: -

**“It is obvious that the accused person entered into a well calculated scheme to defraud the bank through loan application and indeed succeeded in stealing Kshs.2.9million. He conspired with the six to effect the offence”.**

38. On the ground that the trial Magistrate did not consider the Appellant's defence, the Respondent submitted that at page 13-15 and 18 of the judgment the defence is analyzed. It was submitted that the Appellant's defence corroborated the prosecution's case. It was argued that he confirmed he was employed by complainant bank. It was submitted that the rest of his defence was mere denial, that did not controvert the water tight evidence of the prosecution but rather exposed the scheme he had crafted to defraud the bank, a scheme which when unearthed led to him absconding duty until he was finally apprehended and charged. The Respondent urged the court to uphold the trial Magistrate's finding that the Appellant is guilty and dismiss the appeal.

39. The Appellants counsel in submissions on the other hand argued that the offence of stealing by servant had not been proved beyond all reasonable doubt for reasons the accounts from which the monies were withdrawn were not fictitious. It was argued that the prosecution did not call the account holders or even the referees to the account holders. The Appellant's Counsel submitted that circumstances analyzed by the trial Magistrate was within the scope of the Appellant's duties and should not be used against him. It was also submitted that PW 2's evidence was wrongly relied on as gospel truth and yet from his evidence he didn't carry out due diligence to see the account holder and the original identity before paying out to the account holder upon signing on receipt of the cash. The Appellant's counsel urged the court to find the evidence of PW 2 unbelievable.

The Appellant's counsel submitted that only 9 CCTV footages were produced and that 7 footages for withdrawals as shown below were not produced and it was not proved that it was the Appellant who made the withdrawal; -

- on 26/6/2015 for Kshs. 240,000/= from A/C of Benjamin Mutambu Maingi;
- 22<sup>nd</sup> July 2015 for Kshs. 240,000/= from A/C of Varlyne Kemunto Omae;
- 23/7/2015 for Kshs. 188,000/= from A/C of Varlyne Kemunto Omae;
- withdrawal on 29/7/2015 of Kshs. 275,000/= from A/C of Irene Kwamboka Birundu;
- withdrawal on 4/8/2015 of Kshs. 200,000/= from A/C of Irene Kwamboka;
- withdrawal on 4/8/2015 of Kshs. 275,000/= from A/C of Onesmus Kimana Charagu;
- withdrawal on 6/8/2015 of Kshs. 201,000/= from A/C of Onesmus Kimana Charagu;

40. It was argued that the trial Magistrate reached a wrong conclusion that the Appellant made withdrawals on account of the 6 account holders and that the offence of stealing by servant had not been proved. It was also submitted that the trial Magistrate wrongly reached the conclusion that the Appellant conspired with the 6 account holders to steal from the bank. It was argued that there was no proof of conspiracy. It was argued that the fact that the clients never repaid their loans cannot be relied on to infer conspiracy. While relying on Lord Archibald's writing on Criminal Proceedings, the Appellant's Counsel argued that there was no proof of an agreement between the Appellant and the 6 account holders to defraud or steal from the complainant.

41. The holding in the authority of **Christopher Wafula Makokha HCCA No. 92 of 2010 – Bungoma** was relied on by the Appellant to support his position that the offence of conspiracy was not proved. It was also submitted that the sentence of 7 years was harsh and excessive and should be reduced. It was also argued that the trial Magistrate did not take into account the Appellant's defence as if it was considered the Appellant would have been acquitted.

42. The holdings in Malindi H.C.CR. Appeal No. 15 of 2009 **Ali Hamisi Mohamed alias Ashikuna vs Republic** and **KSM CR. A. No. 15 of 2018 Jackline Aoko Owili vs Republic** were also relied upon by the Appellant.

#### **ANALYSIS AND DETERMINATION.**

43. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

**“An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1<sup>st</sup> Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1<sup>st</sup> Appellate Court to merely 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 finding 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. ....**

44. I have considered the record of appeal and the submissions by parties and the following are the issues that arise for determination by this Court.

- i. Whether the prosecution proved its case beyond reasonable doubt; and**
- ii. Whether the 7 years' imprisonment sentence for each count imposed by the trial Court was harsh and excessive.**

**Whether the prosecution proved its case beyond reasonable doubt**

45. The Appellant was charged with the offence of stealing by servant contrary to section 268 (1) as read with Section 281 of the penal Code as the main Count. The said sections provide 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.”***

46. On the other hand, Section 281 provides as follows:

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

47. The Appellant was also charged with Counts 2 to 7 all being Conspiracy to commit a felony contrary to section 393 of the Penal Code Cap 63 Laws of Kenya. The said section provides as follows;

***“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”***

48. The standard of proof in criminal cases is proof beyond reasonable doubt and not on a balance of probabilities. This was the holding by Lord Denning in **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373** as follows:

***“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”***

49. It is not in dispute that the Appellant was an employee of the complainant bank at the time the offence took place. It is also not in dispute that the Appellant presented the account opening application forms for all the accounts in question, dealt with the loan approval and presented cash withdrawal slips to PW2. I find that it is noteworthy that none of the 6 account holders could be traced and/or accounted for by the complainant bank when they realized that the disbursed loans were not being serviced.

50. The fact is money was stolen from Co-operative Bank the question that remains to be answered was who stole the said Kshs. 2,900,000/= and whether the accused conspired with others to steal the said Kshs. 2,900,000/=. In his defence, the Appellant stated that everything he was accused of fell within the scope of his duties as a business banker save for withdrawing money on behalf of customers which he denies. He testified that his clients would go to his desk and ask for assistance to avoid queuing and at all times the said clients would still present themselves to the teller and/or cashier and produce their original identity cards before being given the money they have withdrawn.

51. In light of the above, I agree that this was a case of circumstantial evidence as was held by the Trial Magistrate at page 16 of her judgment. This Court has to determine **whether the scale of measuring a case purely based on circumstantial evidence had been met. In Solomon Kirimi M’rukaria v Republic [2014] eKLR where the Court referred to the case of ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR) the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:**

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

52. First, it is noteworthy that the Appellant is the common denominator in the transactions from the opening of the accounts to the withdrawal of money from the six accounts. the Appellant sold the accounts to the six account holders, brought duly filled account opening application forms together with copy of identification cards and presented them to PW1 who in turn opened the said six accounts. the Appellant filled and verified all the loan application forms and carried the necessary due diligence that was required to be done before a loan application can be approved and forwarded the same to the branch manager for approval and subsequently money was disbursed into the said accounts.

53. When it came to withdrawals, the Appellant again presented the cash withdrawal slips to the cashiers for payment. When PW4 who was the branch manager Voi branch reached out to the Appellant on why the loans were not being serviced, the Appellant sought for leave which was denied and the following day he never reported to work, his phone went off and he could not be found at his residence in Voi. To answer to all these, the Appellant testified that he did not abscond however his two-year contract came to an end and he went on a 14 days leave effective 14<sup>th</sup> August, 2015 which culminated to the end of his contract on 1<sup>st</sup> September, 2015. He also denied ever switching his phone off and stated that the bank had all his details.

54. The document examiner confirmed that the handwriting specimen provided by the Appellant, matched the one on the documents that were produced as exhibits. In his defence the Appellant testified that he wrote the name of the name and identity card of the client on the withdrawal slip. From the record, it is clear that no one in the bank other than the Appellant could physically identify the account holders of

the six accounts. it is also clear that the Appellant did not give any explanation on the 23 identification cards that were later on found in his drawer at work.

55. The Appellant did not offer an explanation of why out of the 130 customers in his portfolio, the six that were questionable were opened around the same time, were not serviced and the telephone numbers provided were not going through. On whether the trial Magistrate considered the Appellant's defence, I find that his defence was considered as can be evidenced from page 13 to 18 of her judgment. In **Ndurya v R [2008] KLR 135** the Court of Appeal held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

56. I find that from the circumstances as explained herein above the circumstantial evidence forms a chain so complete that there is no escape from the conclusion that within all human probability the crime herein was committed by the Appellant and none else. I agree with the trial Magistrate's finding that there is a basis to draw an inference of guilt and there are no other co-existing circumstances to weaken and/or destroy the inference of guilt. I find that the evidence of the account holders or referees in this case would have no weight as they were not the complainants. It is my finding that the prosecution proved its case and in my view if indeed the Appellant wanted to create doubt on the prosecution's evidence, a good way to do so would be to call the account holders to testify on his behalf.

**Whether the 7 years' imprisonment sentence for each count imposed by the trial Court was harsh and excessive**

57. Section 281 and 393 of the Penal Code provide for imprisonment for seven years, in the event one is found guilty of offences similar to the ones the Appellant was charged with. In his mitigation before the trial Magistrate, the Appellant submitted that he was a first offender, was remorseful, and prayed for leniency. In light of the mitigating factors, I find that the period of 7 years' imprisonment in each of the counts was manifestly excessive despite the fact that the said sentence was to run concurrently.

58. The upshot is that the appeal against conviction is dismissed and I uphold the trial Court's conviction. The appeal against sentence is allowed to the extent that the 7-year sentence is substitute with the period already served that is, 1 year, 3 months and eighteen days for each Count to run concurrently.

59. In view of the above, the Appellant is set at liberty forthwith unless he is otherwise lawfully held

It is so ordered.

Right of appeal in 14 days.

**Dated, Signed and Delivered**, in open court this **18<sup>th</sup>** day of **March, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**