**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CRIMINAL APPEAL NO. E011 OF 2020**

**DORRIS MWENDE BAINI.....APPELLANT**

**V**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against conviction and sentence entered by the Chief Magistrate Hon. J.M. Njoroge in Chuka Criminal Case No. 1358 of 2018 on the 29/09/2020)**

**JUDGMENT**

The appellant Dorris Mwende Baini was charged in the Chief Magistrate's Court at Chuka with the offence of Stealing by Servant contrary to **Section 281 of the Penal Code**. It was alleged that on 18th December 2018 at Jatomy Building in Chuka Township Meru South within Tharaka Nithi County, being a servant to Irene Gakii, she stole Kshs.276,570/- the property of the said Irene Gakii which came to her possession by virtue of her employment.

1. The appellant denied the charge and a full trial was conducted. The prosecution called three (3) witnesses. The appellant was convicted and sentenced to a fine of Kshs.100,000/- or in default to serve four (4) years imprisonment.

2. The appellant was aggrieved by both the conviction and sentence. She proceeded and filed this appeal which raises the following grounds:-

***(i) That the learned magistrate erred in law and facts by convicting the appellant for an offence of stealing by servant while there was instructively no sufficient evidence to sustain the particular offence.***

***(ii) That the trial magistrate erred in law in failing to find that the essential ingredients for the offence of stealing by servant under section 281 of the Penal code were not proved and that the particular charge before the court could not be upheld.***

***(iii) That the trial magistrate erred in law in failing to find that the glaring discrepancies in the evidence tendered by the prosecution incapable of sustaining the offence of stealing by servant as per the charge.***

***(iv) The trial magistrate erred in law by convicting the appellant on the basis of prosecution evidence that was of no relevance and or probative value in respect of the particular charge against the appellant.***

***(v) The trial magistrate erred in law in convicting the appellant for the offence of stealing by servant where evidently there were clear indications that the alleged theft was committed by another person other than the appellant.***

***(vi) That the trial magistrate erred in law in failing to find that there was no intention and that the appellant had not in any way committed the alleged offence.***

***(vii) That the trial magistrate erred in law in convicting the appellant whereas there was evidence tendered clearly indicating that the appellant had not committed the alleged offence of theft.***

***(viii) That the trial magistrate erred in law in failing to find that there was neither sufficient, proper nor conclusive evidence to sustain an offence of stealing by servant for the specific charge before the trial court.***

***(ix) The learned trial Magistrate errored in law in misdirecting himself, thereby arriving at the wrong conclusions, conviction and sentence.***

***(x) That the trial magistrate erred in law in either failing and or omitting to find that both the Investigation Officer and the prosecution had failed to diligently discharge their duties for either failing and or neglecting to pursue one Mr. Phillip that was mentioned in statement by both the complainant and the appellant as the person that had committed the alleged theft and thereby wrongly convicting and sentencing the appellant.***

***(xi) That the trial magistrate erred in law by either failing and or neglecting to reasonably consider the averments and submissions of the defence because had he done so he would have concluded and come to the finding that the appellant was not guilty of the particular offence before the court.***

***(xii) The sentence passed/meted against the appellant by the learned trial court was manifestly draconian, excessively punitive and unfairly oppressive considering the facts and circumstances of the alleged offence.***

3. The appellant prays that the appeal be allowed, the conviction and sentence be quashed and she be set at liberty.

4. The appeal proceeded by way of written submissions. For the appellant submissions were filed by Waklaw Advocates for the appellant. The submissions by the respondent were filed by the Director of Public Prosecutions.

***5.*** I have considered the appeal. This being a first appeal, I am enjoined to analyze, evaluate the evidence which was tendered before the trial magistrate and come up with my own independent finding but bear in mind that I did not see the witnesses when they testified and leave room for that. This is the holding in the case of ***Okeno -v- R 1972 E.A 32.***

6. The brief facts of the case are that the complainant, Irene Gakii (PW1) had employed the appellant in her Mpesa Shop within Chuka Town. On 18/12/2018 the complainant received a call from appellant at about 2.00pm informing her that money had been lost. The complainant rushed to the shop and the appellant narrated to her how the money got lost through theft by one person known as Philip who was a frequent customer at the shop. The complainant reported the matter at Chuka Police Station. The appellant was arrested and charged. The trial magistrate found her guilty and ordered her to pay Kshs.400,000/- as compensation to the victim. She was also ordered to pay a fine of Kshs.100,000/- in default to serve four years imprisonment.

7. The appellant in her submissions has narrowed down four issues for determination. Having considered the issued it is my view that three issues stand out for determination.

These are:

(i) Whether the charge against the appellant was proved beyond any reasonable doubts.

(ii) Whether the trial magistrate erred by ordering the appellant to pay Kshs.400,000/- compensation

(iii) Sentence.

**8. Analysis of the issues:**

**Whether the charge was proved beyond any reasonable doubts**

The appellant submits that she did not commit the offence nor did she plan the loss or take the money. According to the complainant, it is the appellant who called her to report that all the money was robbed. The appellant did not indicate the amount that was stolen. PW1 went to the shop and met the appellant. The complainant in her testimony did not indicate the money that was stolen.

9. According to PW2 Miriam Kendi, who was also an employee of the complainant, on 18/12/2018, she gave the appellant Kshs.70,000/- to buy float at Co-operative Bank. She was later informed by the complainant that the cash got lost was never used to purchased the float. She told the court that the complainant did not tell her who had stolen the cash. She also testified that the appellant had not ran away.

According to the complainant, she had given the appellant 200,000/- float but did not indicate when she gave her that amount. That the appellant had sent herself Ksh.46,000/- in her personal living.

Sgt Patrick Kasuki (PW3) who is attached to DCI- Meru South, investigated the matter. He testified that the appellant had stolen shop goods with Kshs.6570, Mpesa float of 200,000/- and she had been given Kshs.70,000/- by her co-worker had transferred Kshs.46,000/- to her account.

10. The appellant was charged with a criminal offence. It is trite that the burden is on the prosecution to prove the charge and the particulars beyond any reasonable doubts.

11. The fact that the money was stolen is not in dispute. The appellant admitted that she was given a float of Kshs.200,000/- and there were proceeds from Boutique Sales. She said she had a total of kshs.270,000/- which went missing. I find that the defence of the appellant was not plausible. Her evidence was that she locked the door with a padlock when she went to the toilet. There was no break in and it is doubtful that another person called Philip stole the money. The appellant had deposited Kshs.46,000/- in her Mpesa line.

12. After analyzing and evaluating the evidence, I find that the facts are not in dispute. The appellant admitted that she was an employee of the complainant and was fully in charge of the shop. She also admitted that she had Kshs.276,510 in cash which was lost that day.

13. The trial magistrate in his judgment found that, "the accused did not produce evidence of having transacted with Philip on the material day. On cross-examination the appellant changes the narrative and states that she didn't leave the said Philip in the shop. On further cross-examination she states that she suspect Philip of the theft yet he was not in the shop." Page 25 line 15-18.

The trial magistrate finally stated that –

> "The evidence points out to the fact that the accused stole the money." Page 26 line 12. I find that the trial magistrate reached a proper finding based on the evidence which was laid before him and the admission by the appellant in her defence that the money alleged to have been stolen was in the shop.

14. The appellant has argued that her conduct was not that of a person who had stolen. The issue raised is that there was *mensrea*. A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the owner of it. This constitutes the *actus reus* of the theft, *mensrea* is then deduced from acts of dishonestly which manifests criminality. The appellant failed to keep proper records as from 30/11/2018. Even as she alleged theft she had transferred Kshs.46,000/- in her personal mobile number (line). She had a criminal mind even before she called the complainant to report. Criminal liability was proved. The appellant was given Kshs.70,000/- to bank but she did not do so. She had intention o steal the money. There was strong circumstantial evidence which was tendered which led to only one inference, that of the guilt of the appellant. This answers grounds, 1, 2, 3, 4, 6, 7, 8, 9 and 11. The appellant is the one who committed the offence and she had part of the root in her mobile phone, she cannot say there was another person who stole. It even turned out during the proceedings that she alleged person was her close friend and had given her some Kshs.50,000/- when she had a shortage and on the material day she had deposited Kshs.22,000/- for him, see page 19 of the record. The appellant's defence was not plausible. The defence of the appellant was a sham and it was property rejected by the trial magistrate. I fin that the prosecution discharged its burden to prove the charge against the appellant beyond any reasonable doubts.

15. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows: "Sentences are imposed to meet the following objectives:

Retribution: To punish the offender for his/her criminal conduct in a just manner.

> **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
>
> Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
>
> Community protection: To protect the community by incapacitating the offender.
>
> **Denunciation:** To communicate the community's condemnation of the criminal conduct."

16. The principles guiding interference with sentencing by the appellate Court were properly set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it.**
>
> **To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court.**
>
> **It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

17. The Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

> *"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."*

In this case the appellant the appellant was charged under **Section 281 of the Penal Code** which provides:-

> ***" 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."***

The section states that the person is "liable to imprisonment for seven years". Where the phrase liable appears, it gives court discretion to impose as fine or other form of none custodial sentence. In this case the trial magistrate opted to give an option of a fine. The tirial magistrate was in the circumstances bound to bring the sentence with the confines of **Section 28 of the Penal Code**. Cap 63 Laws of Kenya which deals with fines**. Section 28 (2) of the Penal Code** provides:-

> ***"In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale"***

The provision in couched in mandatory terms. It is meant to ensure that where the court considers a fine to be appropriate sentence, which is a none custodial sentence, the default clause should not be too long as it narrates the very essence of a none custodial sentence.

In this case the trial magistrate was in error as he imposed a fine of Kshs.100,000/- in default to serve four years imprisonment. Contrary to the mandatory provision of **Section 28(2) of the Penal Code.** (supra) which provides that when the fine imposed exceed Kshs.50,000/- the default sentence is twelve (12) months. In line with the above authorities, I find that I have reason to interfere with the sentence of the learned trial magistrate as the default clause was manifestly excessive and contrary to the express provision of **Section 28 of the Penal Code.**

In the circumstances, with regard to the sentence, I set aside the sentence imposed by the learned trial magistrate and substitute with a fine of Kshs.100,000/- in default one year imprisonment.

18. On the issue of compensation **Section 31 of the Penal Code** provides that a person who has been convicted may be ordered to pay compensation. The section provides:-

> ***" Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."***

The court has discretion to order compensation in addition to the punishment imposed or may be ordered as a substitution for any other punishment. It was therefore proper for the trial magistrate to order the appellant to pay compensation. There is however an error on the compensation ordered as it is not based on matters which were before the learned trial magistrate.

The appellant was convicted for stealing **Kshs.276,510/-** as stated in the particulars of the charge. It was therefore extraneous for the trial magistrate to order compensation of kshs.400,000/- which is quite outrageous. It is not clear from the Judgment or from the record how the figure of Ksh.400,000/- was arrived. The trial magistrate erred in ordering compensation which was over and above what was stolen. The order cannot be upheld. Indeed the State conceded that the order of compensation had no basis.

In the circumstances, I set aside the order that the appellant shall pay **Kshs.400,000/-** as compensation to the victim and substitute with an order that the appellant shall pay the victim **Kshs.276,570/-** as compensation.

**In conclusion**

**(i)** The appeal on conviction lacks merits and is dismissed.

**(ii)** The sentence imposed by the learned trial magistrate is set aside and substituted with a sentence of Kshs.100,000/- in default one year imprisonment.

**(iii)** The order that the appellant shall pay Kshs.400,000/- as compensation to the victim is set aside and substituted with an order that the appellant shall pay **Kshs.276,570/-** as compensation to the victim.

**DATED, SIGNED AND DELIVERED AT CHUKA THROUGH ONLINE VIRTUAL PROCEEDINGS THIS 27TH DAY OF MAY 2021.**

**L. W. GITARI**

**JUDGE**

**27/5/2021**