



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 48 OF 2019**

**BETWEEN**

**ANN NAFULA BARASA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal against conviction and sentence in Criminal Case Number 391 of 2018**

**in the Principal Magistrate's Court at Winam by Hon. F.M.Rashid (RM)**

**on 24<sup>th</sup> June, 2019)**

**JUDGMENT**

1. **ANN NAFULA BARASA**, the Appellant was charged with stealing by servant contrary to Section 281 of the Penal Code (**the Act**) with an alternative count of handling stolen property contrary to Section 322 (1) and (2) of **the Act**.
2. The prosecution called 3 witnesses in support of the charges. **PW1 Joseph Ochieng and his wife PW2 Carolyne Cheptoo Kirwa** recalled that they had employed the Appellant to take care of their baby. It was their evidence that they left her at home with the baby on 22.06.18 but on arrival home later in the evening found their baby unattended and the Appellant missing. They stated that they discovered that a laptop HP DELL, mobile phones Techno and Alcatel, Samsung Tablet, power bank Samsung, assorted clothes and Kshs. 25,000/- were missing from their bedroom. The Appellant was later arrested and the witnesses were shown a Techno Phone and Samsung Power bank allegedly recovered from her and they identified them as their property.
3. **PW3, Omuse Veronica Osiko**, the investigating officer stated that she re-arrested the Appellant from Kimilili Police Station from where she was detained upon being arrested by Administration Police Officers from Kamukuywa. It was her evidence that a Techno Phone and Samsung Power bank, yellow dress and black jacket allegedly recovered from the Appellant were identified by PW1 as theirs and the Appellant was later charged.
4. In her sworn defence, the Appellant denied the offence. She also denied that a Techno Phone and Samsung Power bank, yellow dress and black jacket were recovered from her.
5. In a judgment dated 24<sup>th</sup> June, 2019, *the Appellant* was convicted and sentenced to serve 7 years' imprisonment.

**The Appeal**

6. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 10.09.19 raising 4 grounds of Appeal which I have summarized into 2 grounds **THAT**:

**1. That Appellant is a minor**

**2. The prosecution case was not proved**

## Analysis

7. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

**"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."**

8. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of both parties and I will address the issues for determination as hereunder.

## Is the Appellant a minor

9. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** provides THAT:

**Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.**

**1. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person**

10. It is therefore apparent that the burden to prove that the Appellant is a minor lay squarely upon her. In the absence of the such evidence, the submission by counsel that she is a minor cannot stand and it is therefore rejected.

## Was the prosecution case was proved

11. There is evidence that Appellant was arrested by Administration Police Officers from Kamukuywa. **PW3, Omuse Veronica Osiko**, the investigating officer stated that she re-arrested the Appellant and received a Techno Phone and Samsung Power bank, yellow dress and black jacket allegedly recovered from the Appellant at the time of her arrest.

12. It is worthy to note that the prosecution did not call the arresting officer that allegedly recovered the supposedly stolen items. Appellant's defence that none of the exhibits produced in court were recovered from her casts doubt on their recovery which doubt the trial court ought to have resolved in Appellant's favour.

13. The fact that the Appellant left the complainant's house without permission would have been relevant only if the prosecution had proved that she was found with any of the stolen items. In the absence of such evidence, the trial court erred in faulting the Appellant for not offering an explanation on an issue which she was under no obligation to offer.

## Orders

14. From the foregoing analysis, I am in agreement with the Appellant's counsel that the evidence presented by the prosecution was not watertight. I therefore find that the conviction and sentence entered against the Appellant was not safe and ought not be allowed to stand. I allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant shall be set be at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED IN KISUMU THIS 12<sup>th</sup> DAY OF March, 2020**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Amondi**

**Appellant - Present**

**For Appellant - Ms. Odera hb for Mr. Mauwa**

**For the State - Ms. Gathu**