REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 5 OF 2018

CYNTHIA ACHIENG OLOO…… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal case No. 2079 of 2016 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi – Senior Resident Magistrate)

JUDGMENT

1. **Cynthia Achieng Oloo,** the appellant herein, was convicted for the offence of stealing by servant contrary to section 281 of the Penal Code.

2. The particulars of the offence were that on diverse dates between 2nd May 2016 and 5th August 2016 at **Busia** town, in **Township** location of **Busia** County, being a servant of **Vincent Barasa Mwanza** stole a sum of Kshs. 371,875/= which came to her possession by virtue of her employment.

3. The appellant was fined Kshs. 50,000 or serve 12 months imprisonment. She now appeals against both conviction and sentence.

4. The appellant was represented by Wycliffe Okutta, learned counsel. She raised four grounds of appeal as follows:

a) That the learned trial magistrate erred in law and in fact in convicting her without evidence to support the charge;

b) That the learned trial magistrate erred in law and in fact by relying on impugned and inadmissible evidence;

c) That the learned trial magistrate erred in law and in fact in failing to consider the defence of the appellant; and

d) That the learned trial magistrate erred in law and in fact in failing to factor in the submissions.

5. The appeal was opposed by the state through Ms. Ngari, learned counsel.

6. The facts of the prosecution case were briefly as follows:

The appellant and the complainant entered into an employment contract on 3rd March 2015. The appellant was employed to work at an M-Pesa outlet. On 6th August 2016 the complainant discovered some missing cash and when an audit was conducted, Kshs. 371,875/= was established to have been stolen.

7. The appellant denied to have been an employee of the complainant and also denied having stolen the money.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

9. Although the record of appeal was not well prepared, I noticed from the original record that an employment agreement between the appellant was produced. In the agreement dated 3rd March 2015, the assignment of the appellant was prescribed as working at an M-Pesa counter as a M-Pesa customer attendant. I therefore find that the prosecution established the fact that the appellant was an employee of the complainant to the required standards, in spite of the contention by the appellant to the contrary.

10. The allegation of theft was not proved. It was not enough for the complainant to allege theft without establishing the same. He needed to produce documentation since the time the appellant last accounted for what was in her possession to the period complained of showing from the record the unaccounted-for sum. This was not done.

11. The prosecution had a duty to prove that the alleged missing sum of money, was stolen by the appellant. The prosecution alleged that she diverted some of the money to herself. Again, there was no attempt to prove this fact. This would have called for the prosecution to establish cellphone number 0708 308 504 actually belonged to the appellant as was claimed and that she diverted some of the complainant's money to herself through that number.

12. Joseph Barasa (PW2) introduced himself as an accountant. During cross examination, this witness conceded that he was not an auditor. It is only a qualified auditor who can carry out an audit which a court can rely on. Interestingly, he later conceded that it was his boss who had a license as an accountant. The best description for this witness is that he was a quack. The learned trial magistrate erred in allowing a quack to purport to hold himself out as a professional. It was not only grievous to justice to rely on such a witness, but prejudicial to the appellant.

13. The learned trial magistrate had nothing at her disposal to convict the appellant except suspicion. It is trite law that however strong a suspicion may be, it has no probative value unless propped by some material evidence. In **Sawe vs. R. [2003] KLR 354,** the Court of Appeal held inter alia:

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

In the instant case, the suspicion was very remote. The prosecution failed to prove its case against the appellant. I therefore quash the conviction and set aside the sentence. I make an order that the fine paid herein be refunded to the appellant.

DELIVERED and **SIGNED** at **BUSIA this 22nd day** of **January, 2019**

KIARIE WAWERU KIARIE

JUDGE