



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.118 OF 2017**

**(An Appeal arising out of the Ruling and Order of Hon. J. Gandani (CM) delivered on 4<sup>th</sup> July 2017 in Kibera CM.CR. Case No.3139 of 2009)**

**JANE WAMBUI SIMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Jane Wambui Simba was charged with the offence of **stealing by servant** contrary to **Section 281** of the **Penal Code**. The particulars of the offence were that on diverse dates between 7<sup>th</sup> and 21<sup>st</sup> April 2009 at Wilson Airport in Nairobi County, the Appellant, being a servant of East Africa Air Express Limited stole from the said company the sum of Kshs.54,440/- and US Dollars 2,736 all valued at Kshs.245,960/- which came in her possession by virtue of her employment. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was found guilty as charged. She was sentenced to serve one (1) year imprisonment. Aggrieved by her conviction and sentence, the Appellant filed an appeal to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She faulted the trial magistrate for convicting her against the weight of evidence. She was of the view that the trial court had no basis in law and in fact for making the finding that she was guilty as charged. She took issue with the fact that the trial court failed to take into consideration her defence before reaching the impugned decision. She was aggrieved that the sentence that was meted on her was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow the appeal, quash her conviction and set aside the custodial sentence that was imposed on her.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kangahi for the Appellant and by Ms. Chege for the State. Mr. Kangahi submitted that the prosecution did not establish the charge of **theft** to the required standard of proof. He pointed out that none of the prosecution witnesses established indeed that the amount that was allegedly stolen was received by the Appellant. The evidence pointed out that there were other employees who worked with the Appellant and who also issued tickets and received payments. The two employees did not produce any evidence to show that the money that they had received was handed over to the Appellant. He submitted that the Appellant was convicted on the evidence of the company's director who testified that the Appellant was the one who had the responsibility to bank the money after each day's sales. However, no evidence was adduced to support the assertion that it was the Appellant who exclusively banked the money on behalf of the company.

Learned Counsel was of the view that taking into account the circumstances which the Appellant was arrested *i.e.* three months after she had left employment, the testimony that she had adduced in her defence ought to have been considered. He submitted that the Appellant's arrest and subsequent charging was an afterthought. In essence, counsel was saying that the prosecution failed to establish its case on the charge brought against the Appellant to the required standard of proof. As regard sentence, he was of the view that the trial court should have considered the non-custodial option instead of sentencing the Appellant to serve a custodial sentence. In the premises therefore, he urged the court to allow the appeal.

Ms. Chege for the State opposed the appeal. She submitted that the prosecution established to the required standard of proof that the Appellant received money on behalf of her employer but failed to bank the same. The Appellant disappeared after an inquiry was made by the employer in regard to her failure to bank the money. The prosecution established that the Appellant was in-charge of two other employees and would normally receive the money from the other employees after the sales of the tickets. The evidence adduced against the Appellant was watertight and established that indeed the Appellant stole from her employer. As regard the Appellant's defence, learned prosecutor submitted that the issue raised by the Appellant regarding sexual harassment by one of the director was not raised when the

director testified before court. She was of the view that this issue was an afterthought. Her defence was a mere denial. She therefore urged the court to dismiss the appeal and confirm the conviction and the sentence.

Before giving its verdict, this court will set out the facts of this case, albeit, briefly. The Appellant in this case was at the material time an employee of the complainant, East Africa Air Express Limited. She was employed in the year 2005. Her duties included issuing tickets for those who sought to fly with the company. The company was in aviation industry. She initially worked with the company's ticketing office at Jomo Kenyatta International Airport before she was transferred to Wilson Airport where she was made the in-charge. According to PW2 George Kivindy, who was then the commercial director of the company, the Appellant's duties included receiving cash from the two employees who sold tickets and thereafter bank the same in the company's bank account at National Bank of Kenya within Wilson Airport.

The two employees PW1 Yvonne Mumbi Magisu and PW4 Emma Akoth Mbogo testified that upon selling tickets, they handed over the money received to the Appellant. PW1 and PW4 testified that between the 5<sup>th</sup> and 24<sup>th</sup> April 2009, they sold tickets to customers on a day to day basis and at the end of each day handed over the money to the Appellant. They produced the receipts they issued to the customers indicating the amount they received for the purchase of the tickets. The said receipts were produced into evidence by PW5 PC Douglas Nzala, the investigating officer.

PW3 Edward Oyogi was at the material time an Accountant with the company. He recalled that between the period 7<sup>th</sup> and 27<sup>th</sup> April 2009, he waited for the Appellant to make a report on the sales of tickets. The Appellant did not make any report. When he tried to contact her, she did not respond to his calls. He made a report to PW2. He then went to the bank to check if any amount had been deposited. He noted that only two deposits had been made on 15<sup>th</sup> April 2009. The two deposits were for the sum of Kshs.16,000/- and the other for US dollars 1678. He then went to Wilson Airport and checked the computer printout in relation to the tickets that had been sold and to confirm the monies received. He noted that the sum of Kshs.54,440/-and US dollars 2,736 which had been received after the sales of the tickets was missing. When he inquired from PW1 and PW4, they informed him that upon receiving the cash from the ticket sales, they handed over the same to the Appellant. PW3 informed PW1. PW1 tried to contact the Appellant but could not reach her. The Appellant absconded from work. On 30<sup>th</sup> April 2009, she was dismissed from employment. A report was made to the police. After looking for the Appellant, she was found on 11<sup>th</sup> July 2009. She was arrested. She was arraigned before court and charged with the theft.

When she was put on her defence, the Appellant denied stealing from her employer. She told the court that she had disagreed with PW1 and was verbally told not to return to work. She explained the reason for her animosity with PW1 was because she had declined his advances when he sought to have a sexual relationship with her. She denied that she received the money from the ticket sales from PW1 and PW4. She stated that her duties did not include banking any cash received. She attributed her travails to vendetta by the company's director.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

**“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.**

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **theft by servant** contrary to **Section 281** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal put forward by the Appellant and the submission made during the hearing of the appeal. There are certain issues that are not in dispute in this case. It is not disputed that the Appellant was employed by the complainant. She was employed as a ticketing sales person. At the time of the incident, she had worked for the complainant for a period of four years. It is further not disputed that she was transferred from Jomo Kenyatta International Airport to Wilson Airport where she was placed to be in-charge of two other employees who were also ticketing sales persons.

It was the prosecution's case that between the 7<sup>th</sup> and 21<sup>st</sup> April 2009, the Appellant received money from the ticket sales but failed to bank the same as she was required to. PW1 and PW4 adduced evidence which established to the required standard of proof that indeed they sold tickets on the material dates and handed over the money to the Appellant. Although Appellant denied that she received the money from PW1 and PW4, it was clear to this court that, being the person in-charge at Wilson Airport, she had the mandate and responsibility to receive the cash from the sales and bank the same. The Appellant's assertion that there was no documentary evidence to prove that she had been given the money is incredible in light of the fact that she was the one who normally received the cash and accounted for it to her superiors. This was a normal practice with the company which obviously depended on existence of trust between the Appellant and the two members of staff who work under her supervision. The prosecution was able to establish to the required standard of proof that indeed sales of tickets were made on the material dates in which the sums of Kshs.54,440/- and US Dollars 2, 736 was received but was not banked. Documentary evidence was produced in court which established this fact.

The Appellant's conduct at the time raised suspicion. The Appellant refused to take calls from her superiors. When she learnt that she was being looked for, she absconded from duty and went underground. Attempts to trace her from her residence proved futile because she had moved house from where her employer knew she was a resident. In **Malowa v Republic [1980] KLR 110**, the court held that the act of the appellant in disappearing from the scene of crime pointed to his guilt conscious for the offence that had been committed. In the present appeal, the Appellant's conduct showed her guilt mind. *Why would she leave her employment without giving notice to the employer? Why would she switch off her mobile phone and prevent her employer from contacting her? Why would she move house at the time when she was being looked for?* Taken in totality, this court formed the view that the evidence adduced by the prosecution witnesses was consistent, cogent and corroborative and established to the required standard of proof that indeed the Appellant stole the money that she had received from the

sales of tickets and then disappeared from her place of employment.

As regard the Appellant's defence, this court upon re-evaluating the same formed the view that it was escapist and self-serving. The Appellant attributed her troubles with the employer to sexual harassment by a director. This court found the allegation to be not only preposterous but also absurd. If it was indeed true as alleged by the Appellant that she had been sexually harassed by the director, and that the charges brought against her were as a form of revenge, nothing would have been difficult than for the Appellant to raise the issue of sexual harassment when the director appeared before court to give his testimony. The Appellant had the opportunity to cross-examine the director on the issue but failed to do so. The only inference that can be drawn for this failure to raise the issue with the director when he was in court is that the issue of sexual harassment was raised as a red herring in a desperate but ultimately futile bid to divert the court's attention from the Appellant's criminal responsibility.

The upshot of the above reasons is that the appeal lodged by the Appellant on conviction lacks merit and is hereby dismissed. On sentence, the Appellant is on firmer ground. Taking into consideration the value of the amount that was stolen, the trial court ought to have given the Appellant a non-custodial option instead of a custodial one. The Appellant is a first offender. There were no aggravating circumstances that would have made the trial court reach the verdict that the only sentence that she would have meted out on the Appellant was a custodial one. This court notes that the Appellant was in prison for a period of two months before she was released on bail pending appeal. In the circumstances therefore, this court sets aside the custodial sentence of one (1) year imprisonment that was imposed by the trial court and substitutes it with a sentence of this court sentencing the Appellant to pay a fine of Kshs.50,000/- or in default she shall serve six months imprisonment. The cash bail that she deposited to secure her release on bail pending appeal shall be converted to the fine that this court has imposed. It is so ordered.

**DATED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2019**

**L. KIMARU**

**JUDGE**