REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 49 OF 2017

DOROTHY SIMUKWO.....APPELLANT

-Versus-

REPUBLIC.....RESPONDENT

[Being an appeal from original conviction and sentence on 10th April, 2014 in Kabarnet Principal Magistrate's Court Criminal Case No. 98 of 2014 by Hon. E. Bett (Ag. SRM)]

JUDGMENT

1. The appellant was charged jointly with one Joseph Makokha on the 6th day of February 2014 at Rocks Gardens in Kabarnet Township within Baringo County. She and the co-accused were servants of Jane Owino. They were charged with the offence of stealing by servant, contrary to section 281 of the Penal Code, and it was the prosecution's case that they stole from the said Jane Owino Ksh. 46,000/= which came into their possession by virtue of their duties.

2. The case was heard by the learned trial Magistrate Hon. E. Bett (Ag. SRM) and judgment delivered on 10th April, 2014. The learned trial magistrate found the 1st accused who is the appellant in the instant case solely guilty of theft, acquitting the 2nd accused. The 1st accused/appellant was convicted and sentenced to serve 2 years in prison.

3. Following the judgment, the appellant lodged an appeal based on the following grounds:

> *1. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant to pay a fine of Ksh. 100,000/= or serve two (2) years imprisonment without giving adequate consideration to the appellant's defense.*
>
> *2. That the learned trial magistrate misdirected on the **essential ingredients of stealing by servant** contrary to section 281 of the Penal Code.*
>
> *3. That the learned trial magistrate erred in law and in fact by failing to independently analyze and/or evaluate the defense evidence before drawing a conclusion as by the law required.*
>
> *4. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant without due regard to her mitigating factors.*
>
> *5. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant without allowing her proper legal representation especially during defense hearing and sentencing given that the appellant is a first offender.*
>
> *6. That in the whole, the conviction and sentence of the appellant was against the weight of the evidence as the prosecution did not **prove their case beyond reasonable doubt** and the trial magistrate sentenced the appellant on a flawed procedure.*
>
> *7. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant by imposing a very harsh, improper and/ or excessive sentence in the circumstances given that appellant's co-accused was acquitted.*

4. The Appellate Court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own as seen in ***Okeno v. R*** [1972] EA 32 and ***Mohamed Rama Alfani & 2 Others v. Republic***, Criminal Appeal No. 223 of 2002.

The Evidence

5. The testimonies of the witnesses before the trial Court were as follows:

*"**PW1** was one Jane Awuor Owino, the complainant who told the court that she is a business lady operating a bar and restaurant at Rock Gardens in Kabarnet.*

She stated concerning the appellant that she had been employed at the bar for a year but had quit and come back for 2 weeks. She testified that on the material date, 06.02.14, she sent one of the employee who would handle her monies to the bar and it was reported to her that the appellant told him that there was no money.

PW1 testified that the appellant said that the money disappeared when she left the keys with her co-accused (now acquitted). She stated that she went out and on coming back, the money was nowhere to be found despite the attempt to look for it for 2 hours.

PW1 stated that around Ksh. 46,000/= worth of sales had been sold on that particular night. She told the court that only the counter lady (the appellant in this case) had access to the key. She stated that the money stolen had never been returned.

On cross-examination PW1 responded that she did not expect the 2nd accused (acquitted) to be having the keys. She stated that he had been newly employed and the appellant always had the keys with her. On re-examination, she stated that the 2nd accused only has keys to the gate and would never go past the counter.

***PW2** was a DJ at Rock Bar told the court that the complainant is his employer. He stated that the appellant was known to him as the counter lady at the bar. He stated that on the material date, he was ordered to reduce the volume of the music so that everybody at the bar could leave. He stated that this was unlikely since they never required customers to leave the bar.*

He stated that the appellant and previous co-accused were left alone at the bar and this is when the appellant gave her co-accused the keys to the counter as she went to the toilet. He stated that the 2nd accused opened the padlocks at the counter and PW2 later left. The next day, he was informed of the theft.

PW2 stated that the appellant always went home with the counter keys.

On cross-examination, he confirmed that he had seen the appellant handing the keys to the co-accused who opened the padlocks. He stated that he did not see whether the co-accused gave the appellant the keys because he had left.

He stated on re-examination that there are times he slept at the bar but not this time.

***PW3**, Miriam Nekesa told the court that she had worked for the complainant for a period of 6 years. She stated that she could confirm that both the appellant and her co-accused were on duty on the material date. She indicated that they worked on a promotion on the material night and left the bar, together with others, at 6.00 a.m.*

She told the court that all money would be kept in the appellant's custody. On cross-examination, the appellant stated that he left together with the appellant but he did not know whether or not she had the keys.

He confirmed that the appellant had never stolen anything before. On re-examination PW3 said that the appellant sold and gave money to the 2nd accused. He stated that stock taking is done in the morning but the counter lady keeps possession of the money until the stock is taken.

***PW4** was 60289 PC Julius Kairethia who is attached at Kabarnet Police Station told the court that he was the Investigating Officer in the instant case. He stated that the 2 accused persons had been accused of stealing Ksh.46,000/= from their employer, a claim that was confirmed from the stock book which he produced in court as Exhibit 1. He also produced the payment sheet for the 2nd accused person.*

On cross-examination, PW4 stated that he arrived at the stolen amount from the stock book.

The court ruled that a prima facie case had been established. The 1st accused (now appellant) was found to have a case to answer and was put to her defense.

***DW1,** the appellant testified that she was employed at Rock Bar where they used to work overnight. She told the court that on the material day, she left work at 5.00 a.m. She stated that she had given the keys to the 2nd accused to unlock for her. She said that he unlocked and closed the padlocks but she forgot to ask for the keys.*

She stated that the complainant called her that morning to ask for the money. She states that upon arrival at the bar, it is the soldier (2nd accused) that came with the keys to open. She stated that she and the soldier were later arrested.

Upon cross-examination by the court prosecutor, she stated that the drawer which contained money from the sales was kept in a drawer without a lock. She stated that the 2nd accused is the one who was left with the key. She stated that she was drunk as she left the bar.

The 2nd accused also cross examined her. She denied claims that she had told him that her child did not have school fees and this caused her to deposit money into her Mpesa the following day. She also indicated that it was him that was telling the DJ to kick out the customers.

***DW2** in unsworn statement was the 2nd accused person, Sibia Abdul Juma who states in summary that the 1st accused (appellant) instructed him to close early as there was no work. He stated that the appellant closed the doors and left for a call of nature while she had not closed the door to the main bar. He said that when the accused left the bar, he also left along with her. He told the court that he found out about the lost money on the next day when he arrived at work. He stated that he found that the doors were already open and the appellant was looking for money that had disappeared without success.*

He stated that the appellant had never left him with any of the keys and that particular night was no exception."

6. The learned trial magistrate found that the total amount missing from the sales was Ksh. 45,995/= which was rounded off to Ksh. 46,000/=. She convicted the 1st accused under section 215 of the Criminal Procedure Code for the offence of stealing by servant, saying that the involvement of the 2nd accused with the money was too remote and speculative and acquitting him on the basis of section 281 of the Penal Code. The appellant was convicted on the basis of section 215 of the Criminal Procedure Code that states as follows:

"The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."

Analysis of the Evidence

7. Upon considering the evidence as required of a first appellate court (***Okeno v. R*** [1972] EA 32), it would appear from the above testimonies, that the appellant admitted in some instances that it was her fault that the money had gone missing, and, indeed, that she ought to have been more responsible for the counter area and keys where she was assigned. The appellant admitted to have been drunk at the time the money disappeared. There is no direct testimony that the appellant took the money from the counter. However, the circumstances of the case point to her likely culpability for carelessness that occasioned the loss of the money. It would appear that the money was stolen when the appellant went to the toilet leaving the door to the bar open as testified too by her co-workers PW2 and the co-accused. The appellant is entitled to benefit from the doubt so created. She cannot be conceited for the suspicion, no matter how strong, that she stole the money as the person responsible for the counter where the money was kept.

8. The evidence against the second (2nd) accused was the suspicion that he may have taken advantage of the situation when the appellant forgot to take back the keys to the bar which he was given by the appellant to help her unlock the padlocks, and therefore had opportunity to access the Counter where the money was kept. There was not sufficient evidence, save this accomplice evidence of the appellant, to convict the 2nd accused whom his co-accused appellant in her defence said she had been left with the keys when she forgot to take them from him after she had given the keys to him to help her unlock the padlocks for her. PW2 their co-worker only testified that the 2nd accused had been given the keys to the bar at closing time and that the appellant had gone to the toilet but he did not confirm whether the 2 nd accused was left with the keys or not.

9. I do not find that the elements of ***theft*** by servant contrary to section 281 of the Penal Code were proved. What was proved before the learned trial magistrate was negligent dealing with the complainant's property to which the appellant was entrusted, and this can only be a basis for a cause of action for breach of agent's contractual duty to account or the torts of conversion or negligence in civil claim rather a criminal charge of theft, which in accordance with section 268 of the Penal Code requires proof of ***taking*** something capable of being stolen ***with the intention of depriving the owner*** of its permanent use or to ***use the money at the will of the person who takes***, as follows:

*"268. (1) A person who **fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.***

*(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following **intents**, that is to say –*

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

***(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;** and*

"special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of

the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

The Sentence

10. On the appeal from the sentence, section 26 (3) of the Penal Code permits the imposition of a fine in addition to or in substitution for imprisonment. Section 28 (1) (a) of the Penal Code Provides that "where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive." I consider that the fine of Ksh.100,000/= to be excessive for the offence of theft by servant bearing in mind the value of amount alleged to have been stolen at Ksh.46,000/=. In addition, the guide for the imprisonment period in default of payment of fine under section 28 (2) of the Penal Code does not allow whimsical imprisonment terms and the term provided for default of payment of fine for an amount above **Ksh. 50,000/=** is **12 months**. The penal idea behind the fine as a sentence is never that should the offender fail to pay he be severely punished now for the offence or for the default in payment of the fine.

11. The Court must consider the circumstances of the cases and settled on the fine as the primary method of treatment of the offender in the particular case. The default imprisonment term is merely a provision for the alternative dealing with the offender who although able to pay the fine is unwilling or reluctant to pay. See the ***Judiciary Sentencing Policy Guidelines*** at para. 11.10 and 11.11, where the principles are set as follows:

"Determination of a Fine

11.10 The fine fixed by the Court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken account. Except in petty cases and in which case the necessary information is within the court's knowledge, a presentence report should be requested from the Probation Officer to provide information which would assist the court in reaching a just quantum.

Imprisonment in Default of Payment

11.11 The period of imprisonment in default of a fine must not exceed six months unless allowed by the law under which the conviction has been obtained. (See section 342 of the Criminal Procedure Code). The Penal Code, for instance, allows for imprisonment for twelve months where the amount exceeds Ksh. 50,000/=. Where the law does not expressly set the period of imprisonment in default of payment of a fine, the court must be guided by the scale laid out in section 28 (2) of the Penal Code."

12. A default sentence of imprisonment for 2 years is punitive and outside the scales provided for under section 28 (2) of the Penal Code. I would find the default imprisonment term of 2 years for the fine of Ksh. 100,000/= irregular and illegal, and liable to be set aside.

13. However, as the conviction of the appellant of the charge of theft by servant contrary to section 281 of the Penal Code was not proved beyond reasonable doubt, the sentence will be set aside.

Orders

14. Accordingly, for the reasons set out above, the Court pursuant to section 354 (3) (a) (i) of the Criminal Procedure Code quashes the conviction for the offence of theft by servant contrary to section 281 of the Penal Code and sets aside the sentence of fine of Ksh. 100,000/= and in default 2 years imprisonment imposed on the appellant.

DATED AND DELIVERED THIS 27TH DAY OF APRIL, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Macharia, Ass. DPP, counsel for the Respondent.