



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 15 OF 2018**

**JACKLINE AOKO OWILL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against conviction and sentence in Criminal Case Number 116 of 2015 in the Senior Resident Magistrate's Court at Winam delivered by Hon. MC. N. Njalale (RM) on 18<sup>th</sup> December, 2017)**

**JUDGMENT**

1. On 18<sup>th</sup> December, 2017; the Appellant was convicted for the offence of Stealing by Servant Contrary to Section 281 of the Penal Code and was sentenced to serve 3 years imprisonment.

**The Appeal**

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the grounds of Appeal filed on 21<sup>st</sup> February, 2018, Appellant raised 7 grounds of Appeal which I have summarized into 5 grounds **THAT:**

- 1. The learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond any reasonable doubt**
- 2. The learned trial magistrate erred in law and in fact in failing to consider Appellant's defence**
- 3. That the sentence is harsh**
- 4. The learned trial magistrate ignored the proposal for a non-custodial sentence contained in the probation report.**
- 5. The learned trial magistrate erred in law and in fact in relying on hearsay and inconsistent evidence.**

3. When the Appeal came up for hearing on 5<sup>th</sup> April, 2018, Ms. Wafula, learned counsel for the state conceded to the Appeal on the ground that the prosecution case was not proved beyond reasonable doubt and further that Appellant's defence that the money in question was stolen while she was riding on a boda boda was not controverted.

**Analysis**

4. This being a Court of first Appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC (1972) E.A. 32**, where it held that:-

**“It is the duty of a first Appellant Court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”**

5. I have carefully considered the written Submissions made by the Appellant and oral Submissions on behalf of the state.

6. The evidence on record confirms that the Appellant was employed by the Complainant as a Mpesa executive and her duties included depositing in the bank, money collected from the sales and Mpesa transactions at the Complainant's shop in Mbale. It is on record that on 23.1.15, Appellant reported to the Complainant that she had been robbed on her way to the bank. Complainant went to the shop on 24.1.15 and found Kshs.186,772/- missing and she reported the matter to the police as a result of which Appellant was charged.

7. One cannot talk about stealing by servant without referring to the definition of stealing under Section 268 of the Penal Code Chapter 63 Laws of Kenya which states as follow:

**1. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to 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 -**

**(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he intends afterwards to repay the amount to the owner**

8. In her defence, Appellant maintained that that on 23.1.15, she was riding on a motorcycle to the bank to deposit Complainant's money when she was robbed by an unknown pillion passenger that was travelling on a motor cycle whose registration number she did not see because the said motorcycle was riding at a very high speed.

9. In her judgment, the learned trial magistrate ruled that Appellant had conspired with other people to steal Complainant's money on the ground that she left the motorcyclist to chase after the thieves and secondly that she did not avail the said motorcyclist as her witness.

10. I have considered the evidence on record and there is no evidence that Appellant converted the money to her own use. The trial Court's finding that Appellant had conspired with other people to steal Complainant's money was against the weight of evidence on record. Appellant in her Defence clearly explained what she did after the money was stolen and the fact that she did not call the motorcyclist as her witness was no good ground for the Court to impute suspicion on her part or to reject her Defence.

11. In the case of Sawe vs Republic [2003] KLR 364 the Court held that:

**“Suspicion however strong cannot be a substitute of cogent evidence against an accused person.”**

In my considered view, the Defence had cast doubt on the prosecution case which ought to have been inferred in favour of the Appellant.

#### **Decision**

12. From the preceding analysis, I am in agreement with the state that the evidence presented by the prosecution is not watertight. I therefore find that the conviction and sentence entered against the Appellant was not safe and should not be allowed to stand. I allow the Appeal, quash the conviction and set aside the sentence. I order that the Appellant should be set be at liberty unless otherwise lawfully held.

**DATED AND SIGNED THIS 12<sup>th</sup> DAY OF April 2018**

**T. W. CHERERE**

**JUDGE**

**IN THE PRESENCE OF**

**Court Assistant: Caroline**

**Appellant: Mr. Munuango**

**For the state: Ms. Wafula**