



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CRIMINAL APPEAL NO.28 OF 2016

BETWEEN

GADAFI MOHAMMED.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence

in Rongo SRM's Court Criminal Case No.174 of 2014

dated 8th June, 2016 – Hon. P.K. Rugut, SRM)

JUDGMENT

1. The appellant (**GADAFI MOHAMMED**) was convicted on a charge of stealing by servant contrary to **Section 281 Penal Code** and sentenced to serve 2 years imprisonment. The charge against him was that on 8th May 2014 at DECHE market in Migori County, being a servant to Eunice Barrack, he stole from her M-Pesa Services shop Kshs.99,646/= which came into his possession by nature of his employment.
2. The appellant denied the charge and after trial in which four prosecution witnesses testified, and he was the only defence witness, he was convicted.
3. **BEVACON COMPANY** was a telecommunication services company which also dealt in **SAFARICOM** products such as Mpesa services, and selling air time within Migori County. The appellant had been employed to man the company's shop at **DEDE** market and had been given Kshs.50,000/= for the float and Kshs.100,000/= in cash. He was also given cards and airtime and Safaricom line to sell he reported to the Company's Executive Director (**EUNICE AWUOR**) that he had lost Kshs.99,646/= from the Mpesa shop. The Company Supervisor **BOGMAN TOM ONYUKA** (PW1) was instructed to find out the circumstances of the loss. So on 11th September 2014, PW1 went to the centre where the appellant was working and found him at the AP Camp.
4. Upon interrogation the appellant said that as he was closing the shop, 4 boys approached him seeking to deposit Kshs.40,000/=, and these are the people who robbed him of the money Kshs.99,646/=. On being pressed to tell the truth, the appellant changed his story to say that it was an Orange line customer who told him that he (appellant) had won Kshs.100,000/= and requested him to send money so as to

receive what he had won.

5. When PW1 did a physical check of the money, he realized that the appellant only had a float of Kshs.10,000/= and cash Kshs.50,300/= - the sum of Kshs.99,646/= was missing.

6. From the Mpesa statement 2 names appeared i.e. Jennifer Chacha (the appellant's mother) and Hellen Atieno (his Stepmother). The appellant had used their id/cards to register Safaricom lines – Hellen Atieno was registered for 0704420879 while Jennifer Chacha had 0728129746. The appellant was using all these numbers and Jennifer's number had Kshs.90,800/= deposited in sums of Kshs.10,000/= , 32,800/=, 10,800/=, all on 10/05/2014 and Kshs.10,500/=. Hellen's line had a deposit of Kshs.32,000/=, and another Kshs.37,508/= was in Jennifer's line.

7. The appellant's mother **JENNIFER CHACHA ANYANGO** (PW4) confirmed that the appellant registered his Sim card using her number because he was still in school.

8. The appellant in his sworn defence confirmed that he worked for Dede Bevacon Services as an Mpesa agent but was adamant that he did not steal the money. He admitted on cross examination that he had both his mother's and stepmother's identity cards – being Jennifer and Hellen. He disowned the story about 4 men who robbed him or the one about missing Kshs.1000,000/=. He also denied talking to the supervisor or even being questioned about the missing money and that his accounts were accurate.

9. The trial magistrate upon considering the evidence pointed out that a perusal of the Mpesa statement showed transfer of monies totalling to Kshs.80,680/= in the line for Jennifer Chacha, and that there was no explanation for the huge sums transferred to PW4's phone number by the appellant and linked this to the missing money. The appellant's defence was considered and rejected as being too general.

10. The appellant challenged these findings on amended grounds of appeal saying that he was conned by some people who pretended to be Safaricom Agents – actually he now confirmed the lottery story he had disowned before the trial court. However he had a rider that after depositing the money, so as to get what he had purportedly won in the lottery, he got to learn that this was a syndicate orchestrated by his boss. He also acknowledged that there was money deposited in his two mothers' accounts. He pleaded with the court to give him a non custodial sentence saying he has already served one year.

11. In response Miss Owenga for the State indicated she was relying in the evidence on record at trial.

12. I do not think there is anything to re-evaluate, the appellant in his appeal infact admitted loss of the money, and the inappropriate manner in which he dealt with it, without the authority of his employer. There is no issue to revisit regarding the findings of the trial magistrate which led to the conviction. I find that the conviction was safe and it is upheld.

13. The offence attracts a sentence of seven years and a 2 year sentence is by no means harsh. He abused a position of trust and there is no evidence that the money was recovered. Consequently the appeal is dismissed.

Written and dated this 26th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 31st day of January, 2017 at Migori

A.C. MRIMA

JUDGE