REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 120 OF 2013

BETWEEN

CHRISTINE SADIE OMINDO ..……. APPELLANT

AND

REPUBLIC …….....…RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L. Gitari, CM dated 10th October 2013 at the Chief Magistrates Court at Kisumu in Criminal Case No. 664 of 2007)

JUDGMENT

1. The appellant **CHRISTINE SADIE OMINDO** was charged, tried and convicted of three counts of stealing by servant contrary to **section 281** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the counts were that the appellant, being a cash officer at K-Rep Bank Limited ("the Bank") stole Kshs. 800,000/-, Kshs. 1,000,000/- and Kshs. 800,000/- on 28th May 2007, 12th June 2007 and 18th August 2007 respectively at K-Rep Bank Limited ("the Bank") which came into her possession by virtue of her employment.

2. After a full trial, she was convicted on each count and sentenced to pay a fine of Kshs. 200,000/- on each count or in default serve one year imprisonment on each count. Being aggrieved by the conviction and sentence, the appellant now appeals.

3. In her petition of appeal dated 16th October 2013, the appellant faulted the trial magistrate for failing to appreciate the contradictions in the prosecution case. She complained that the trial magistrate erred in failing to appreciate that the case against her was based on circumstantial evidence and that the prosecution failed to prove it to the required standard. That the trial magistrate failed to appreciate that mere opportunity did not mean that the appellant committed the offence in question to the exclusion of all the other staff members. The appellant complained that the trial court reached conclusions that were not based on evidence and that the prosecution failed to call competent witnesses to her prejudice. She further complained that the trial magistrate lowered the standard of proof and that the judgment was against the weight of the evidence on record. The appellant contended that the sentence imposed on her was manifestly harsh and excessive in the circumstances.

4. At the hearing of the appeal, Mr Onsongo, learned counsel for the appellant, submitted that the appellant's conviction was based on the fact that she had access to the Bank vault whereas the evidence showed that other bank employees had access to it. He argued that in addition to the appellant, the other employees who had access to the vault had the opportunity to steal. Counsel further submitted that the prosecution relied on witnesses who were suspects and documents that did not support its case on the

alleged dates of theft. He further submitted that the prosecution failed to call essential witnesses.

5. Ms Nyamosi, learned counsel for the respondent, opposed the appeal. She argued that the conviction and sentence were proper as PW 1's testimony proved that it is the appellant who, not only had the opportunity to steal but also signed for the lost money. She urged the Court to uphold the conviction and the sentence of the trial court.

6. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form an opinion on their demeanour (see ***Okeno v Republic*** **[1972) EA 32**).

7. The prosecution case was supported by the evidence of four witnesses. Josephat Njoroge (PW 1), an employee of the Bank, recalled that in late 2007 he worked as a cash officer at its Kisumu branch. His duties included managing the vault, ATM and the tellers having taken over such duties from the appellant on 11th August 2007. He told the court that when he joined the Kisumu branch, he was assigned the duty of reconciling the respondent's books of accounts as there were some difference in the ATM accounts that needed reconciling and which had accrued when the appellant was a cash officer.

8. PW 1 testified that after going through the cash, vault and ATM journals he noticed some inconsistences. He noticed that 28th May 2005, the appellant signed out Kshs. 800,000/- from the vault for the ATM and signed the cash register but the amount was not reflected in the ATM journal. On 12th June 2007, the appellant sighed out Kshs. 1,000,000/- from the vault but the ATM was not replenished on that day as evidenced by the ATM journal. On 18th August 2007 appellant signed out Kshs. 1,100,000/- from the vault but the ATM journal indicated a replenishment of Kshs. 200,000/- leaving Kshs. 900,000/- unaccounted for.

9. PW 1 told the court that to access the vault, two custodians had to apply a security key but in all the instances it was the appellant who signed out the money and she also had the obligation as the Cash officer to ensure that correct entries were entered in the ATM journal and cash loaded in the ATMs. PW 4 produced the various journals as exhibits in the matter on behalf of the investigating officer.

10. Antipas Nyanjwa (PW 3), a forensic document examiner, examined the appellant's handwriting and matched with the handwriting on the various journals. He concluded that the appellant's sample handwriting and the handwriting in the journals was similar and indistinguishable and that it was the appellant's handwriting.

11. The appellant gave sworn testimony in her defence. She stated that the vault was one office with a security door to be accessed with two keys and a combination. That she and other four officers had the key to the vault and the combination. The ATM also had to be accessed by two officers who had a combination to the safe. The appellant stated further that the money may have left the vault but she did not know how it failed to reach the ATM. She was of the view that any one of the custodians of the vault could have stolen the money.

12. It is not in doubt that appellant was an employee of the Bank. The main issue for determination in this case is whether the prosecution established beyond reasonable doubt that the appellant stole the money particularised in the charge. It is the appellant's case that other employees had access to the vault and any one of them who had the key and combination to the vault could have stolen the money. However, from the evidence of PW 1, once the appellant signed for the money out from the vault, as the cash officer she had the obligation to ensure that correct entries were made in the ATM journals and right amounts were loaded into the ATM. This evidence was not controverted. In her defence, she simply stated that she did not know how the money failed to reach the ATM yet it was her duty to ensure that it got to the ATM.

13. The appellant did not deny that she signed for the money on the three occasions. This fact was confirmed by the evidence of PW 3. I therefore find and hold that the appellant's defence that anyone who had the key could steal the money does not hold weight as it is clear that she is the one who signed out for the money on the three occasions and not any of the other custodians of the vault combination and

key.

14. The appellant contended that the prosecution failed to call other employees who had access to the vault and who accessed the vault at the same time as the appellant as they were crucial witnesses. It is trite law that the prosecution is not required call all or any witness to prove a fact. **Section 143** of ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides:

> *No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*

15. There are of course instances when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case. In ***Bukenya & Others v. Uganda*** **[1972]EA 549** it was stated:

> *It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.*

Likewise, in ***Keter v Republic*** **[2007]1 EA 135** the court held inter alia thus:

> *The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*

16. The other possible witnesses were the custodians of the key and combination to the vault. From the evidence of PW 1 and the exhibits, it is the appellant who signed out the missing money and it was her duty to ensure that it got to the ATM but she failed to do so. What happened to the money was a matter within her knowledge and she had a duty to provide a reasonable explanation under **section 111** of the ***Evidence Act***. In this case, the fact that she stole the money was an irresistible conclusion borne from the evidence. I find and hold that the testimony of other witnesses would not have added any value to PW 1's testimony as it is clear that money was lost in the appellant's custody and she had no explanation for it.

17. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 27th day of February 2017.

D.S. MAJANJA

JUDGE

Mr Onsongo instructed by Onsongo and Company Advocates for the Appellant.

Ms Nyamosi, Assistant Deputy Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.