



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 133 OF 2014**

**MARY NDUNGE MUTHUSI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the conviction and sentence of Hon. L. Simiyu Ag SRM delivered on 4<sup>th</sup> July 2014, in Criminal [Case](#) No. 1358 of 2013 in the Chief Magistrate's Court at Machakos)**

**JUDGMENT**

Mary Ndunge Muthusi, the Appellant herein, was charged with four (4) counts of the offence of stealing by servant contrary to section 281 of the Penal Code. The particulars in Count I were that on diverse dates between 25<sup>th</sup> October 2013 and 12<sup>th</sup> November 2013 at Machakos town in Machakos County, being the sales supervisor of one Annabilis Nthamba, she stole cash of Kshs. 996,100/= the property of the said Annabilis Nthamba, which had come to her possession by virtue of her employment.

In Count II the particulars were that on the 5<sup>th</sup> November 2013 at Machakos town in Machakos County, being the sales supervisor of one Annabilis Nthamba, she stole cash of Kshs. 21,000/= the property of the said Annabilis Nthamba, which had come to her possession by virtue of her employment.

In Count III the particulars were that on the 9<sup>th</sup> November 2013 at Machakos town in Machakos County, being the sales supervisor of one Annabilis Nthamba, she stole cash of Kshs. 14,000/= the property of the said Annabilis Nthamba, which had come to her possession by virtue of her employment.

In Count IV the particulars were that on unknown date in the year 2013 at Machakos town in Machakos County, being the sales supervisor of one Annabilis Nthamba, she stole cash of Kshs. 60,000/= the property of the said Annabilis Nthamba, which had come to her possession by virtue of her employment.

The Appellant was also charged with an alternative offence to count IV of handling stolen goods contrary to section 322(1)(2) of the Penal Code. The particulars were that on 13<sup>th</sup> November 2013 at Machakos County otherwise than in the course of stealing, she dishonestly received or retained one duvet blanket, knowing or having reason to believe it to be a stolen good.

The Appellant was arraigned in the trial court on 15<sup>th</sup> November 2013 when she pleaded not guilty to the charge. She was tried, convicted of Counts I, II and III of the main offence. She was sentenced to pay a fine of Kshs. 50,000/= and in default to serve 1 year in prison for Count I; to pay a fine of Kshs.20,000/= and in default to serve 6 months imprisonment for count II; and in count III she was fined Kshs. 20,000 and in default to serve 6 months imprisonment. The jail terms were to run consecutively to each other in default of fine. Count IV and the alternative offences were found not to have been proved and were

dismissed.

The Appellant being aggrieved has appealed the conviction only, having paid the fines imposed upon her by the trial Court. The Appellant's grounds of appeal are stated in her Petition of Appeal dated 17<sup>th</sup> July 2014 filed on the said date by her learned counsel, Mutinda Kimeu & Company Advocates.

In summary, the Appellant alleges that the magistrate did not consider and analyse the evidence adduced; there was contradicting and inconsistent evidence by all witnesses; there was no evidence that the Appellant stole the alleged money; the magistrate erred in finding that the prosecution had proved that the accused person collected the sums claimed and did not make bank deposits as inscribed; the burden of proof by the prosecution had not been discharged; the magistrate shifted the burden of proof to the Appellant; and that the magistrate erred in finding that the Appellant had not proved bad faith on the part of the complainant and the witnesses such that they would lie against her.

The Appellant's learned counsel in addition filed written submissions dated 4<sup>th</sup> March 2016. It was argued therein that the findings by the trial magistrate that the facts were not denied nor explanations made by the Appellant shifted the burden of proof. It was also submitted that the prosecution did not avail evidence of the bank statements of the complainant to prove that no banking was made, and that the prosecution did not prove the amount claimed to have been received by the Appellant on all the Counts.

Further, that the prosecution did not prove that the Appellant took or fraudulently converted the thing alleged to have been stolen to her use, and that under section 281 of the Penal Code it is a requirement of law in theft by servants that there be proof that a sum of tangible money had been received by the Appellant, and had been dishonestly appropriated by her. Reliance was placed on the decisions in **Stephen C. Mwangi vs Republic, (1998) eKLR** and in **Godfrey Litavi Sura vs Republic, (2013) eKLR** in this regard.

Lastly, it was contended by the Appellant that PW1 had given contradicting information in that she testified that the Appellant stole money from her between 25/10/2013 and 12/11/2013, and she alleged to be out of country during that period having gone to Turkey and Thailand on business. It was pointed out that PW5 testified that PW1's passport which was the Prosecution's exhibit 20 showed that she came back on 26/10/2013, and was therefore in the country from that date up to 12/11/2013.

The Prosecution did not file any submissions or response to the appeal despite being given ample opportunity to do so.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

From the foregoing submissions and evidence, I find that the issue raised in this appeal is whether the Appellant's conviction for the offences of theft by servant was based on sufficient and satisfactory evidence. **Section 281** of the Penal Code sets out the offence of stealing by servant in the following terms.

***“Stealing by clerks and servants***

***If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”***

PW1 in this regard testified that the Appellant was her employee, and produced as the Prosecution's exhibit 1 an appointment letter dated 1<sup>st</sup> November 2008, in which she employed the Appellant as a shop attendant. PW2 and PW3 corroborated the evidence by PW1 that the Appellant was her employee, and specifically testified that they were working together with the Appellant in PW1's shop, and that the

Appellant was their supervisor in charge of collection of the cash from sales and banking the same.

As regards Count 1 the evidence of theft produced by the Prosecution was the cash book produced as the Prosecution's exhibit 3, that showed the amounts of money received for sales between 25<sup>th</sup> October 2013 up to 12<sup>th</sup> November 2013, which was itemised by PW1 in her testimony as follows:

1. On 25/10/2013 – Ksh. 19,170
2. On 28/10/13 –Ksh. 79,055
3. On 29/10/13 –Ksh. 23,945.
4. On 30/10/13 – Ksh. 78,620
5. On 31/10/13 – Ksh. 35,280.
6. On 1/11/13 – Ksh. 85,405.
7. On 2/11/13 – Ksh. 96,220.
8. On 4/11/13 – Ksh. 2,750.
9. On 5/11/13 – Ksh. 130,780.
10. On 6/11/13 – Ksh. 119,715.
11. On 7/11/13 – Ksh. 99,170.
12. On 8/11/13 – Ksh. 128,620
13. On 9/11/13 Ksh. 45,770.
14. On 11/11/13 Ksh. 48,600.
15. On 12/11/13 Ksh. 7,000.

I have perused the said cash book and note that the said amounts correspond to those itemised by PW1. The total of the said amounts is Kshs. 996,100/=, which the Appellant is charged with stealing in Count I.

The Appellant has in this regard alleged that PW1 was in the country between 26<sup>th</sup> October and 12<sup>th</sup> November 2013 and could also have received the said cash. This question was put to PW1 during cross-examination, who responded that the Appellant used to receive all the sales, and even if she personally sold items she would give the money to the Appellant. This evidence was also corroborated by PW2 and PW3 who stated that the Appellant was the one who received and banked all the money from the sales made.

In addition the prosecution brought evidence of the bank slips that the Appellant availed PW1 which were only for cheque payments and not for cash payments. Lastly, PW1 produced as the Prosecution's exhibits 4 and 5 the bank statements of PW1's accounts at Co-operative Bank of Kenya Machakos Branch for the period between 22<sup>nd</sup> October 2013 and 30<sup>th</sup> November 2013, and at National Bank of Kenya for the period between 7<sup>th</sup> October 2013 and 30<sup>th</sup> November 2013. A perusal of the said statement shows that no deposits whether of cash or cheque were made in the account at National Bank of Kenya between 26<sup>th</sup> October 2013 and 12<sup>th</sup> November 2013, while only cheque deposits were made in the Cooperative Bank of Kenya account during that period.

I am alive to the fact that the evidence relied upon by the prosecution of the theft of these amounts was circumstantial. The law concerning circumstantial evidence was laid down in ***Ndurya v R* [2008] KLR 135** by the Court of Appeal where it was held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt. Similar holdings were reached in ***Sawe v Republic* [2003] KLR 364** and ***R v Kipkering arap Koske and Another* 16 EACA 135**.

In the present appeal there was evidence produced of the cash received by the Appellant in terms of the recordings made in the cash book, and evidence of PW1, PW2 and PW3 that the recordings were always made by the Appellant. In addition there was evidence that the said sums of money so recorded were never deposited in PW1's accounts, and the fact that banking of cash was the responsibility of the Appellant was ALSO established by the evidence by PW1, PW2 and PW3.

From the evidence, I find that there can be no other inference but one of theft, with respect to the amounts

of money shown to have been collected in the cash book and not banked by the Appellant, and the conviction of the Appellant for Count I was therefore safe.

However, on Count II and III, I agree with the Appellant that there was no evidence or any record shown by the prosecution of the sums of money given by PW1 to the Appellant on 9<sup>th</sup> November 2013 to deposit in the bank of Kshs 14,000/=; or of the money given by PW1 to PW4 on 13<sup>th</sup> November 2013 to give the Appellant to pay rent of Kshs 21,000/= . The only evidence on record in this regard is the testimony by PW1 and PW4, and no evidence was brought of the persons who were required to receive the rent money to corroborate the testimony by PW1.

Bearing in mind the requirements as to proof by circumstantial evidence enunciated in the foregoing, there is the possibility that the evidence by PW1 and PW4 could be doubted and motivated by other factors, given that PW1 had lost a substantial amount of money received by the Appellant and was also PW4's employer. In the circumstances these two counts were not proved beyond reasonable doubt.

I accordingly allow this appeal only to the extent of quashing the conviction of the Appellant by the trial Court for Counts II and III of the offence of stealing by servant contrary to section 281 of the Penal Code. I also set aside the sentence imposed upon her for the said conviction, including the order imposing fines of Kshs.20,000/- each for Count II and III, and I direct that any fines that may have been paid by the Appellant for Count II and III should be refunded forthwith.

I however uphold and affirm the conviction and sentence imposed upon the Appellant by the trial Court for Count I of the offence of stealing by servant contrary to section 281 of the Penal Code.

It is so ordered.

**DATED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF JULY 2016.**

**P. NYAMWEYA**

**JUDGE**