



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 22 OF 2012**

**MICHAEL MACHARIA GATIMU .....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

*(Appeal from the original conviction and sentence in Criminal Case Number 1224 of 2011 in the Senior Principal Magistrate's Court at Kerugoya – HON. K.K.CHERUIYOT (SRM))*

**JUDGMENT**

**MICHAEL MACHARIA GATIMU**, has appealed to this court against both the conviction and sentence meted out against him 17<sup>th</sup> October, 2012 by Honourable K.K. Cheruiyot –Senior Resident Magistrate in Kerugoya –Senior Principal Magistrate's Court Criminal Case NO. 1224 of 2011.

Before the trial court the appellant had been charged together with one **JOHN EDWIN KARIUKI** with the offence of stealing by servant contrary to **Section 281** of the **Penal Code**. The particulars given in the charge sheet indicated that the appellant on 7<sup>th</sup> and 16<sup>th</sup> November, 2011 stole a total of kshs 40,000/- which monies belonged to Jamii Trust Ltd his employee and which monies came to his possession by virtue of his employment. The appellant after trial was convicted and sentenced to pay a fine of kshs 50,000/- and in default 12 months imprisonment. The appellant was aggrieved and filed this appeal citing seven grounds in his petition which are as follows:

1. *That the learned magistrate erred in law and in fact in failing to find that the prosecution had not proved the charge of stealing by Servant contrary to Section 281 of the Penal Code beyond reasonable doubt as required by law.*
2. *That the trial learned magistrate erred in law and in fact by finding that the appellant has stolen property belonging to Jamii Trust Ltd yet there was no proof that the alleged stolen property belonged to Jamii Trust Ltd thereby showing outright bias in the case.*
3. *That learned magistrate erred in law and in fact by finding that the appellant had stolen property belonging to Jamii Trust Ltd, yet there was no proof that Jamii Trust property had lost such property as there was no audit report produced to show it.*
4. *That the learned magistrate erred in law and fact by shifting the burden of proof from the prosecution to the defence thereby occasioning miscarriage of justice.*
5. *That the learned magistrate erred in law in fact by dismissing the appellant's evidence and submissions without giving good reasons thereto.*
6. *That the learned magistrate erred in law and fact in imposing a severe sentence in the light of the charge against the appellant and circumstances surrounding the offences.*
7. *That the learned magistrate erred in law and fact by convicting the appellant without clear, uncontroverted and admissible evidence present to court.*

The appellant through Wangechi her counsel in this appeal made submissions before this court and mainly emphasized on ground three of this appeal. The appellant has contended that there was no evidence tendered to show that the money stolen belonged to the complainant and in support of this contention he pointed out the absence of an audit report from Jamii Trust Ltd during trial proving that the money had been lost. The appellant further submitted that the mobile phone used to show that transactions took place between PW1 and the appellant was personal and there was nothing to connect the same with the complainant. It was submitted that the prosecution at the trial failed to produce vouchers or statements to show how PW1 obtained the money from the complainant or its agents and that there was no prove that the appellant stole the money.

The appellant has also pointed out that the prosecution witnesses contradicted themselves and gave the example of PW2 who said that a total of kshs 52,080/- got lost while PW4 said the total amount stolen was kshs 52,090/-.

The State through Mr Omayo opposed this appeal stating that the prosecution adduced overwhelming evidence against the appellant at the trial court. Mr Omayo pointed out PW1 adduced sufficient evidence showing how she sent the money to the appellant herein and the same was supported by P. exhibit 1. He also pointed out the appellant was an employee to the complainant as demonstrated by exhibits marked as P. exhibit 3a,b and c and it is that employment that the state submitted was used by appellant to steal from the complainant its employee. He contended that all the witnesses summoned corroborated one another and their evidence were consistent contrary to the appellant's view that there were contradictions.

On the ground that the appellant's defence was not considered, the state submitted that the defence put forward by the appellant was not credible as there was no corroboration provided by witnesses to prove that the appellant was being paid proceeds for his personal business.

I have considered the appellant's submissions and I have also considered the submissions made by Omayo representing the state. My work as an appellate court is to evaluate the evidence tendered and determine whether the same was sufficient enough to discharge the burden normally placed upon the prosecution to prove their case beyond reasonable doubt and also whether the trial was correct to make the decision it did based on the evidence presented before it.

It is uncontested that the appellant herein was an employee of the complainant. The existence of the complainant as a limited liability company duly incorporated is also not in doubt. The prosecution produced sufficient exhibits which I have had occasion to see to prove the same. PW1 told the trial court that she was also an employee of the Jamii Trust Ltd or the complainant and that the appellant was her boss. The appellant appeared not to have disputed this fact as he described her in his defence as a "*colleague*" meaning they were working together for the complainant. PW1 in her evidence explained to the trial court how she was instructed to send money by the appellant to him via mpesa. She told the trial court that she sent a total of kshs 40,000/- to the appellant directly and kshs 12,000/- to the appellant's co-accused **JOHN EDWIN KARIUKI** who was discharged by the trial court pursuant to **Section 210** of the **Criminal Procedure Code**.

The prosecution in my view adduced sufficient evidence to corroborate the evidence of PW1. The exhibits produced by PW4 particularly P. exhibit 4 which is mpesa statement of PW1 and P. exhibit 6 the mpesa statement belonging to the appellant are consistent with what PW1 told the court. The same is also consistent with the offence under which the appellant was charged. He was charged with stealing kshs 35, 000/- on 7<sup>th</sup> November 2011 and kshs 5000/- on 16<sup>th</sup> November 2011. The transaction exhibited on the mpesa statement on the respective dates are captured. The trial court observed the demeanor of PW1 when testifying in court and I find that the observations made by the trial court in his judgment shows that the witness was credible and due weight on her evidence was placed by the learned magistrate. In my evaluation I find that the trial court was correct.

The appellant in his defence admitted that he received kshs 40,000/- via mpesa from PW1. However he told the trial court that the money was meant for his personal business and called two witnesses to

corroborate the evidence. The trial court however was not persuaded and rejected the same. I have not found, from the evidence adduced by the defence any basis to fault the trial magistrate on this score .

The appellant has pointed out the absence of audit report from the prosecution case to show that the complainant lost money. The question that I pose on this aspect is whether theft by servant can only be proved by audited accounts. My answer is in the negative . It is my considered view that sufficient evidence of whatever nature requires to be placed before court of law and it suffices if in the opinion of court, the same is sufficient to establish beyond reasonable doubt that an offence took place and that there is a direct connection of the offence to the accused . In the case before the trial court the learned magistrate was satisfied based on the evidence adduced that the prosecution had proved their case beyond reasonable doubt. I agree with Mr Omayo for state that the four witnesses called by the prosecution gave consistent evidence that proved their case beyond reasonable doubt. I am not persuaded by the sentiments expressed by the appellant that the figures stated by PW2 were different from the figures stated by PW4. However, in so far as the prosecution case is concerned the material particulars on the case facing the appellant was that on the two cited occasions he stole a total of Kshs 40,000/- belonging to the complainant. That is the amount that appellant was charged for stealing and that is the offence for which he was convicted.

The prosecution in my view adduced sufficient evidence before the trial court and the trial court was correct to find that the onus of proof had been discharged by the prosecution.

On the sentence, I find that the provisions of **Section 281** of the **Criminal Procedure Code** provides a sentence of 7 years imprisonment upon conviction. The appellant herein was handed a non-custodial sentence of kshs 50,000/- or 1 year imprisonment in default. The sentence cannot be termed excessive in my view.

In view of the reasons aforesaid I do not find merit on this appeal. I find no basis to interfere with the finding of the trial court either on conviction or sentence . The same is upheld. The appeal is dismissed.

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED IN KERUGOYA THIS 29<sup>TH</sup> DAY OF APRIL 2015** in the presence of

M/S Wangechi counsel for appellant

Mr Omayo for State

Mbogo Court Clerk