



In that regard, this court has considered the evidence by four (4) prosecution witnesses including the complainant **Musa Bashare Khalid (PW1)**, a timber dealer, **Omar Mwangi Kinuthia (PW2)**, another timber dealer, **Jacob Kibet Magare (PW3)**, and the investigating officer, **P.C. Samwel Kalinga (PW4)**.

The court has also considered the unsworn statement given by the appellant in his defence.

From the evidence, it is apparent to this court that the appellant accepted having received money from the complainant (PW1) for purposes of purchasing timber but failed to fulfill the obligation. This fact is clearly indicated in his defence in which he went further to suggest a refund of the money by way of instalments.

Since the appellant was given the money and did not purchase timber or refund it to its owner, a strong presumption arose that he used the money for his own purposes and without the consent of the complainant thereby committing the offence of theft.

What was not made clear by the prosecution was whether the appellant received the money as an agent or employee of the complainant.

The evidence by the complainant suggested that the appellant was his employee. Therefore, the appropriate charge would have been theft by servant contrary to section 281 of the penal code rather than theft by agent under section 283 of the penal code.

Consequently, the appellant's conviction for theft by agent is hereby quashed and substituted with a conviction for theft by servant contrary to section 281 of the penal code.

Both section 283 (b) and section 281 of the penal code carry a sentence of seven (7) years imprisonment. Therefore, the sentence imposed upon the appellant by the learned trial magistrate was lawful but may be and is hereby reduced to two (2) years imprisonment in view of the appellant's mitigating factors and that he was a first offender.

Other than the foregoing alterations to the charge and the sentence, the appeal is dismissed.

**[Delivered and signed this 19th day of March, 2014.]**

**J.R. KARANJA.**

**JUDGE.**