



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 6 OF 2014

ANN WAMBOI KINGANGI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by B. CHELOTI Resident Magistrate Embu in Criminal Case No. 1162 of 2013 on 11th February, 2014)

J U D G M E N T

1. **ANN WAMBOI KINGANGI** the appellant was charged and convicted of the offence of **Stealing by servant contrary to Section 281 of the Penal Code** whose particulars were that **on the 7th day of October 2013 at Leah Enterprise Mpesa, Embu township within Embu County, the appellant stole cash Shs.30,000/= the property of LUCAS GACHOKA NJOKI which came to her possession by virtue of her employment.**
2. She denied the charge and the matter proceeded to hearing. After a full trial she was convicted and sentenced to two (2) years imprisonment. And being aggrieved by the judgment she has appealed against both conviction and sentence.
3. She raised several grounds of appeal which I will consolidate and reduce to four (4) grounds. These are:-

(I) The judgment is against the weight of the evidence.

(ii) The evidence adduced was inconsistent and uncorroborated.

(iii) The learned trial Magistrate did not adhere to the criminal procedure.

(iv) Her defence was rejected without cogent reasons.

4. The Prosecution case is premised on evidence of four witnesses. PW1 told the Court that he is a businessman and runs an Mpesa shop in the name of Leah Enterprises in Embu. The appellant was his employee at the said shop. As at the time of this incident the appellant had worked for him for 1 year and 4 months. He explained how they used to work. Whenever she ran short of cash in the shop she would alert him. On 5th October 2013 the appellant was on duty and the accounts balanced well.
5. On 7th October 2013 the appellant reported on duty at 9 am instead of 7.30 am. He gave her Shs.81,250/= for work plus Shs.2,000/= for her salary. Around 5 pm he received a text message from her asking him to go to the shop as she could not account for Shs.30,000/=. The message read "Ebu kuja hapa kwa shop napata 30K missing". The message was from mobile number 0705215621 which was the appellant's number. PW1 proceeded to the shop and upon review of

- the accounts confirmed that indeed Shs.30,000/= was missing. What was there was Shs.51,250/= instead of Shs.81,250/= which was the opening cash in the morning (Record book EXB1). PW1's phone which received the message was EXB2).
6. PW2 Catherine Gichuku and PW3 Mary Faith Marigi are business women who carry on their businesses near PW1's Mpesa shop. They confirmed that the appellant was the one running PW1's Mpesa business and she had severally served them in that shop.
 7. PW4 PC John Koila received the complaint from PW1 and carried out investigations. On 8th October 2012 he arrested the appellant.
 8. The appellant made a sworn statement in her defence where she denied every allegation against her. She denied having worked for PW1. She says she was called by PW1 on 8th October 2013 and they went to the police station and she was arrested.

In December 2012 PW1 had approached her for her hand in marriage as his 2nd wife. She declined hence the grudge.

9. When the appeal came up for hearing the appellant made oral submissions. In her submissions the appellant just repeated her grounds of appeal. She said the officer who arrested her never testified and that she and PW1 were in a love relationship before this incident.
10. Mr. Miiri the learned State Counsel submitted that the evidence by the Prosecution witnesses was watertight and the conviction should not be interfered with.
11. This is a first appeal and this Court has a duty to re-evaluate and re-consider the evidence and come to its own conclusion. I am alive to the fact that unlike the trial Court, I did not see nor her the witnesses. See

REPUBLIC VS OKENO [1972] EA 32,

REPUBLIC VS SIMIYU & ANOTHER 1 KLR 192.

12. I have carefully considered the submissions by the appellant and the State together with the grounds of appeal. I have equally considered the evidence and the findings by the trial Court.
13. I will deal with ground (i) & (ii) together. PW1 was the complainant in this matter. He explained that the appellant was his employee of 1 year 4 months at his Mpesa shop though this had never been reduced into writing. PW2 and PW3 confirmed that the appellant had been serving them at the said Mpesa shop. The two did their small businesses near the said Mpesa shop. All that the appellant said was deny that she worked for PW1.
14. PW1 produced in Court his phone with the message originating from mobile No. 0705215621 being her mobile number. NO denial. There was no reason that has been shown which would have made the two ladies (PW2 & PW3) to come and lie against the appellant.
15. The appellant told the Court that PW1 called her on 8th October 2013 and told her to go with him to the police station as there was an issue they had to resolve. She then went with him. This cannot be true for the following reasons. The appellant said she had had a love relationship with PW1 before this incident. At the same time in her defence she said PW1 approached her in 2012 to be his wife and she refused. If its true there was a relationship, was it after she refused to be his 2nd wife or before? And if indeed she had rebutted his request to marry him in 2012 how could PW1 call her out of nowhere on 8th October 2013 and she agrees to go with him to the police station for no reason?

That cannot be true. The truth of the matter is that the appellant was employed in PW1's Mpesa shop and there was a reason for their being at the police station on 8th October 2013. I find no merit in those two grounds.

16. For ground (iii) I find no submission showing that the proper procedure in handling this case was not adhered to. The record also shows that the trial Court faithfully followed the correct procedure in handling this case. This ground also fails.
17. In ground (iv) she did not also submit anything on it. The learned trial Magistrate at page 27 lines 3-6 captured the appellant's defence well. She states thus

“The accused person's defence that PW1 approached her for an affair in December 2012 and since she refused his advances he decided to frame her does not hold any water. It does not make any sense why PW1 would frame the accused for a false offence a year later hence the Court dismisses the defence by the accused person.”

It is therefore clear that her defence was considered by the trial Court. It was clearly explained and this was confirmed by the records book that Shs.30,000/= was missing at the end of 7th October 2013 and the appellant who was the employee dealing with the Mpesa account was unable to offer any explanation for the loss.

18. I do note with concern that the appellant had worked for the complainant for 1 year 4 months at a constant pay of Shs.5,000/=. In fact PW1 in his evidence said for the month of September 2013 he had paid her Shs.2,000/= because of some Shs.33,000/= which had earlier on gone missing. From the figures given by the complainant of the amounts the appellant used to handle it is clear that the salary was not commensurate with the work. That is not however to justify the acts of the appellant.
19. I am satisfied that the learned trial Magistrate analyzed the evidence well, made sound findings and arrived at a correct decision and I will therefore not interfere with the conviction.
20. However, considering the amount of money involved and the fact that she was a first offender and maybe targeting to join college, an option of a fine would have sufficed. I will therefore set aside the sentence of 2 years imprisonment and substitute it with a fine of Shs.30,000/= in default 6 months imprisonment from the date of conviction. The appeal succeeds only on sentence to the extent explained above.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF JULY, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Miiri for State

Appellant

Njue CC