



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 185 OF 2007**

FLORIDA KAVUU NTHENGE.....APPELLANT  
VERSUS  
REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 1506 of 2006 in the Chief Magistrate's Court at Nairobi – Ms. L. Mutende (PM) on 09/2/2007)*

**JUDGMENT**

1. The accused, **FLORIDA KAVUU NTHENGE**, is charged with stealing by servant contrary to **Section 281**, of the **Penal Code**. It is stated that on 19<sup>th</sup> July 2006 between 4.00 p.m. and 5.00 p.m. at Signon Freight Complex within Jomo Kenyatta International Airport in Nairobi Province being an employee of Afrika Aviation Service, she stole 71,500, Kshs. and 7,280 U.S. Dollars, the property of the said Afrika Aviation.
2. At the close of the trial in which the prosecution called 11 witnesses, and the appellant testified on oath and called one witness, the learned trial magistrate convicted the appellant and sentenced her to serve 12 months imprisonment.
3. The appellant filed an appeal contesting both conviction and sentence and the grounds upon which she relied may be summarised as follows:
  - 1) *The judgment, conviction and consequent sentence are irregular and a nullity having been written and/or endorsed by a magistrate other than the trial magistrate without following the procedure laid down in law.*
  - 2) *The learned trial magistrate misdirected herself by assuming that certain important issues were not in dispute and thereby failed to address her mind to them to the prejudice of the appellant's case.*
  - 3) *The learned trial magistrate erred in law and in fact in giving her own opinion regarding the different names purporting to be the appellant's and appearing in the various prosecution exhibits which opinion was not supported by any evidence on record.*
  - 4) *The learned trial magistrate failed to appreciate that the fingerprint evidence on record was seriously flawed, dubious, questionable, and uncorroborated.*

- 5) *The learned trial magistrate shifted the burden of proof to the accused.*
- 6) *The learned trial magistrate erred by making findings of fact which are not supported by evidence on record.*
- 7) *Prosecution witnesses, especially PW2 was of doubtful credibility.*
- 8) *The prosecution's evidence did not explain in which among the four envelopes the cash allegedly stolen from was kept.*
- 9) *The circumstantial evidence did not point to the guilt of the appellant.*
- 10) *The prosecution evidence had material inconsistencies and contradictions.*
- 11) *There was no evidence at all linking the appellant to the charge.*
- 12) *Issues for determination were not framed and due consideration was not given to the appellant's defence.*

4. Mr. Amboko, learned counsel for the appellant submitted that the learned magistrate who delivered the judgment in the case, took over the case from Mr. T. O. Okello, Senior Resident Magistrate and did not apply **Section 200(3)** of the **Criminal Procedure Code**. Secondly that she did not frame the points for determination as is required under **Section 169** of the **Criminal Procedure Code** and that she made no reference to the appellant's defence. Thirdly, that there was no evidence linking the appellant to the offence.

5. I note that Mr. Mulati learned counsel for the respondent conceded the appeal on grounds that none of the eleven witnesses pointed at the appellant as the thief.

6. I agree with both Mr. Amboko for the appellant and Mr. Mulati for the respondent, that there was no direct evidence linking the appellant to the offence. The learned trial magistrate being cognisant of this fact rendered herself thus:

**“I wish to state that from the evidence adduced there is no one who saw the accused steal or take the money. The evidence that is available in respect of the stealing is circumstantial”.**

The Honourable Judges of Court of Appeal gave direction with regard to circumstantial evidence in the case of **SAWE V REPUBLIC 2003 KLR 372**. Their lordships pointed out that in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co existing circumstances weakening the chain of circumstances relied on.

7. Evidence in the case before me, shows that access into the safe was gained by opening it as it was not broken. Only **PW1** and **PW2** had copies of the keys to the safe. There is no evidence that on the 20<sup>th</sup> July 2006 **PW2** used that key in the office. That is the reason she returned home to look for the keys there. There is no evidence either that she left the keys where the accused could have accessed them. Even if she had done so evidence on record shows that everyone in the office had access to the office of **PW2**. In her own testimony she said that everyone in the office had to pass through her office to access their own offices.

8. What we have on record is mere suspicion that does not even amount to circumstantial evidence. Suspicion because the appellant's fingerprints were found on the envelopes which were said to be recycled and which she could have handled in the normal course of her duties. Suspicion, no matter how voluminous against an accused person, can never amount to evidence and can never sustain a

conviction. The evidence herein falls far short of the litmus test set in **SAWE V REPUBLIC 2003 KLR 372.**

**9.** Having analysed the evidence on record, I find that the learned trial magistrate did state what points she would consider, in order to draw her conclusions. It is therefore not correct that she did not comply with **Section 169** of the **Criminal Procedure Code**.

**10.** An analysis of the evidence on record also shows that M/s. L. N. Mutende, Principal Magistrate who took over the case from Mr. T. O. Okelo, Senior Resident Magistrate did not address herself to the provisions of **Section 200(3)** of the **Criminal Procedure Code**. This was fatal to the case for the prosecution. Where one magistrate takes over a case in which another magistrate has taken evidence from the witnesses, the succeeding magistrate must inform the accused person of their right to recall any or all of the witnesses who have already testified.

**11.** In the circumstances of this case therefore, and after re-evaluating the totality of the evidence, I find that the appeal filed by the appellant has merit. I allow it, quash the conviction and set aside the sentence. The appellant is ordered set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED** and **DELIVERED** in open court this **16<sup>th</sup>** day of **February 2012**.

**L. A. ACHODE**  
**JUDGE**