**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 240 of 2009**

**SARAH MUTHONI WARUI……APPELLANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

**(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C. NO.3335/2006 by Hon. G. A. Mmasi, Senior Resident Magistrate, dated 26th February, 2007)**

The appellant, Sarah Muthoni Warui and Peter Wainaina Kuria were charged jointly with and tried of the offence of **stealing by servant** contrary to **section 281** of the **Penal Code**. It was alleged that between 6th and 18th February, 2008 at Nyahururu being employees of KEROCHE Company, they stole 983 cartons of Viena Ice Beer and 9 cartons of Viena Light Beer valued at Kshs.617,713/=. After their trial, the court below found them guilty of the offence and convicted them accordingly. They were sentenced to two years imprisonment. Being aggrieved by both the conviction and sentence, the appellant has preferred this appeal on 12 grounds. Eleven grounds were consolidated and argued as three grounds while the 12th ground on the extent of the sentence was abandoned.

The grounds as argued can be summarized as follows:

i) that the case against the appellant was not proved beyond any reasonable doubt



ii) that the appellant's defence was not considered by the trial court.

iii) that the trial court erred in shifting the burden of proof to the appellant and by developing theories not borne out in evidence

Quite properly, in my view, learned counsel for the respondent conceded the appeal on the grounds that the evidence presented at the trial did not meet the threshold required in a criminal trial.

I am, required, even though the State does not oppose the appeal, to re-evaluate the evidence in order to arrive at my own independent conclusion, bearing in mind that I did not see the witnesses.

The prosecution evidence is simple. That the appellant was the depot manager of KEROCHE Company in Nyahururu at the time the theft is alleged to have been committed. It is the prosecution case that the theft was committed by the appellant and her colleague between 6th and 18th February, 2008. That in order to make it appear that the allegedly stolen items were destroyed in the depot by fire, the appellant and her colleague set the depot on fire; that the audit of stock revealed the loss; that based on the debris after the fire had been put out, the missing stock could not have been burnt in the inferno. On the other hand the

appellant's defence was that the lost stock was destroyed by the fire.



The learned trial magistrate found in her judgment that the evidence by the prosecution led irresistibly to the conclusion that the appellant and her colleague stole the items charged. Although the magistrate did not expressly state so, it is clear from that finding that she appreciated that this was a case to be determined on circumstantial evidence as there was no direct evidence to the effect that between 6 th and 18th February, 2008, the appellant and her colleague were seen taking away the missing stock. The law is settled that a conviction can only be based on circumstantial evidence if that evidence points irresistibly to the guilt of the suspect. It is also settled that on relying on circumstantial evidence, the court must ensure that there is no co-existing factor or circumstances which are likely to weaken or destroy the inference of the suspect's guilt.

See **Republic** Vs. **Kipkering Arap Koske & Kimure Arap Matatu** (1949) 16 EACA and **Musoke** Vs. **Republic** (1958) EA 715.

It is not in dispute that there was a fire at the depot on the 18th February, 2008. The only issue to be settled is whether the missing stock was stolen by the appellant in the course of her employment or whether they were destroyed by the fire. The prosecution case is grounded on the evidence of **P.W.1 Wilfred Gichiri Chomba**, (Wilfred) an accounts clerk with KEROCHE Company. Together with **Fredrick Muli,** his boss, Wilfred conducted an audit which



revealed a deficit of Kshs.690,938/= representing 992 cartons of alcohol.

According to analysis of sales of the stock, 983.33 cartons of Viena Ice Beer and 9 cartons of Viena Light Beer were missing constituting a loss of Kshs.617,713.25. The report was prepared by **Fredrick Muli** but was improperly produced by **P.W.1 Wilfred Gichiri Chomba** who the trial court found to have participated in the audit. Improperly produced because Wilfred's participation alone did not qualify him to produce the report. The nature of his participation was not disclosed. The maker ought to have been called. But even if the report was to be relied on, its value was only to confirm the existence of stock at a certain point in time.

I reiterate the question: Were the missing stock stolen or destroyed in the fire? The witnesses were unanimous that there was fire in the depot. While the appellant was categorical that the fire was preceded by an explosion which ripped off the main door and attributing it to an electric fault, the prosecution maintained and the trial court believed that the fire was stage managed to camouflage the theft.

No attempt was made to establish the cause of the fire by experts. No evidence was led to prove that the debris left after the fire was indeed not enough to have come from 992 cartons of blastic beer bottles or whether the items were inflammable.



The learned trial magistrate based her conclusions on theories not borne out of evidence. Infact the learned trial magistrate turned herself into an expert witness concluding for example, that:

> **"One does not have to be an electrician to detect whether there is electricity fault. An electric fault is something obvious and can be noticed by anybody and not necessarily someone trained in that field."**

He further stated:

> **"As such the court agrees that a fire that could consume such a stock was huge enough to cause damage to the entire depot and the fire could probably have spread to the adjoining shops."**

The learned trial magistrate clearly misdirected herself and thereby arrived at the wrong conclusion. As was stated in the case of **Okethi Okale & others** Vs. **Republic** (1965) EA 555, a conviction in a criminal trial can only be based on the weight of the actual evidence presented before the court and not theories put forth by the trial court.

I come to the conclusion that although the appellant was in-charge of the depot at the time of the alleged theft, the circumstantial evidence relied on did not irresistibly point to her guilt at the exclusion of any other person. Besides, there were existing circumstances which weakened any inference of her involvement.



For instance it has not been conclusively ruled out that the missing cartons were not destroyed in the fire. Secondly, there is evidence that the main door was blown open; that the appellant went to report to the police, while her colleague was rushed to the hospital. By the time the police arrived at the scene, members of the public were at the scene and had free access to the premises and stock.

For these reasons, the evidence against the appellant is mere suspicion which cannot be a basis for a conviction as was held in the case of **Bernard Machiobo Kibet** Vs. **Republic** Criminal Appeal No. 34 of 2005.

In the result, this appeal succeeds and is allowed. The conviction is quashed, sentence set aside and the appellant shall be set at liberty forthwith unless lawfully held.

**Dated, Signed and Delivered at Nakuru this 24th day of June, 2010.**

**W. OUKO**
**JUDGE**