



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

**Criminal Appeal 207 of 2006**

**STEPHEN IRUNGU MWANGI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Conviction and Sentence in Senior Resident Magistrate's Court at  
Karatina in Criminal Case No. 507 of 2005 dated 22<sup>nd</sup> November 2006 by B. M. Kimemia-  
R.M.)*

**J U D G M E N T**

The appellant Stephen Irungu Mwangi was charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The particulars being that on 27<sup>th</sup> April 2005 at Rititi village along Kiamachimbi Rititi road, being a servant to **Sospeter Njogu** stole from the said Sospeter Njogu Kshs.50,069/30 as per the amended charge sheet.

The appellant was an employee of the complainant (PW1) as a salesman. His work involved distributing cigarettes on a motor cycle. On the material day the appellant had taken cigarettes worth Kshs.113,709.30 to sell. Later on he went back to PW1 alleging that a log had been placed across his way by robbers who went ahead and robbed him when he fell down from the motor cycle. PW1 stated that on doing his account the appellant had a shortfall of Kshs.50,069.30 and hence the charge. The prosecution witnesses PW2 and 3 were outside their shops at Rititi village when they heard a motorcycle racing by, it hit a ditch and the rider was involved in an accident. PW3 who was with PW2 stated that the accident occurred about 200m away from where they were. That the appellant after the accident rose and continued with his journey. On cross-examination PW3 said he did not see any other thing that would have caused the accident. PW4 the investigating officer was at Kiamachimbi Police Station. On 28<sup>th</sup> April 2005 at about 12.45 p.m. the appellant reported an accident he had been involved in the previous day. That he had been trapped by thugs who stole Kshs.50,069/30 from him at Rititi shopping centre. The appellant reported the incident to PW1 who in turn told him to go and report the matter to Karatina Police Station. The appellant had some bruises at the time of the report. PW4 proceeded to the scene where he found PW2 who told him that he had witnessed the accident. He went on to state that the complainant had given the appellant stock of assorted cigarettes worth Kshs.113709.30 but the appellant only returned with Kshs.63,640/= leaving a shortfall of Kshs.50,069.30 unaccounted for. That the appellant instead of reporting to Kiamachimbi Police Station a kilometre away from the scene, instead chose to report at Karatina police station which is 10 km away from the scene thus raising suspicion.

The appellant did not call any witnesses and gave an unsworn statement of defence to the effect that on 27<sup>th</sup> April 2005 he went in to the field to sell cigarettes. That he sold cigarettes worth Kshs.62,027/= and took the amount to PW1. That in the afternoon he went to sell at Kiamachimbi. However as he approached a corner a person emerged and put a stick in front of the motorcycle forcing him to fall. That person covered appellant's eyes and stole the money and left him under the motor cycle. That thereafter he made a report of the incident at Karatina police station and later to his employer PW1. The appellant denied stealing any money because if he had such intentions, he would not have accounted Kshs.62,027/= to PW1. The appellant did not know how much money was stolen because the thugs took the stock and that he gave the rest of receipts to his employer to collect the money from his previous sales.

Going by the evidence on record, the learned magistrate found in favour of the prosecution, convicted the

appellant and sentenced him to four years imprisonment. That conviction and sentence triggered this appeal. Through **Messrs Peter Muthoni & Company Advocates**, the appellant faulted the learned magistrate for convicting him on the evidence that was barely sufficient, failure to adequately consider the defence advanced by the appellant and finally meting out manifestly harsh, severe and excessive sentence in the circumstances.

When the appeal came up for hearing, **Mr. Orinda**, learned Senior Principal State Counsel conceded to the same and rightly so in my view. In the opinion of **Mr. Orinda**, the evidence tendered was scanty. **Mr. Muthoni**, learned counsel for the appellant also took the same view.

The appellant was a salesman for the complainant. In the course of his duties, he was robbed of some money.

Some though was left with him. What the prosecution did was to bring along two other witnesses who witnessed the alleged accident. It is this evidence that led the learned magistrate to disbelieve the defence story that the appellant had been robbed. It is very much possible that the robbery could have been committed on the appellant elsewhere and not necessarily at the scene of the accident. To my mind this issue was not properly considered by the learned magistrate. The defence advanced by the appellant was reasonable and ought to have been given better treatment. More so considering that there was no eye witnesses to the incident.

It would also appear to me like the issue at hand is one of accounts. There was need for reconciliation of what the appellant sold and what was stolen from him if at all. The figure in the charge sheet it would appear was unilaterally arrived at by the complainant which raises reasonable doubt as to the accuracy of the amount reflected in the charge sheet which doubt ought to have been resolved in favour of the appellant as is the case in every criminal case. The learned trial magistrate erred in law and fact in believing the prosecution version of events in the circumstances as opposed to the defence. It does not add up that the appellant could have stolen Kshs.50,069/30 whilst he had returned unsold stock to PW1 and there were still outstanding debts he had not yet collected from various customers that he had sold cigarettes to on that day. Further no accounts were taken in the appellant's presence to reconcile the figures even after he had accounted for part of the morning collection.

For all the foregoing reasons, I am of the firm view that the appellant's conviction was unsafe. Accordingly I allow the appeal, quash the conviction and set aside the sentence of four years imprisonment imposed on him. The appellant should be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009*

**M. S. A. MAKHANDIA**

**JUDGE**