



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

**AT EMBU**

**Criminal Appeal 31 of 2007**

**JOSEPH MURAGE MUGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal against conviction and sentence *in Baricho Criminal Case No. 1478 of 2006* in which the Appellant was charged, tried and convicted of the offence of stealing by servant contrary to Section 281 of the Penal Code. The Appellant was sentenced to serve five (5) years imprisonment.

Appellant has filed 7 grounds of appeal saying:-

1. That the Trial Magistrate erred in relying on the prosecution evidence which was contradictory and not water tight.
2. That the Trial Magistrate overlooked that there was no documentary evidence was produced to support their mere words.
3. That the evidence which was not free from errors should not be relied upon.
4. The trial Magistrate disputed alibi defence which was the truth.
5. That the evidence lacked merit.
6. That the Trial Magistrate failed to consider mitigation of the appellant.

The appellant relies on his grounds of appeal and the written submissions be submitted to court. The facts of the case were that the appellant was a salesman with G.K. Kamuri & Sons Ltd a beer distributor in Kirinyaga. On 30/7/2006 the appellant was allocated duties to distribute beer around Ngurubani area in a motor vehicle KXJ 952 an Isuzu lorry. He was in control of the vehicle as driver and salesman and was accompanied by Harrison and Symon who were loaders. He was expected to return at about 4.30 p.m. but he did not. Later the vehicle was on Sagana road by the roadside. The appellant and the two loaders were not present. Then the police from Sagana Police Station came and towed the vehicle to the depot. PW1 who found the vehicle never saw the accused again but the two loaders Harrison and Simon came to the scene with police officers. There was still some beer when the vehicle was found valued at Shs.469,704.70. The matter was reported to police the following day. The cash missing was Shs.281,662.40 according to the charge sheet. The manner of operation in the company was explained by

PW2 who was working as Stock Controller with the Company.

An eye witness was PW3 one of the loaders in the lorry. He testified as to how they sold the beer and how later the appellant decided to visit his home near Kangaru dispensary. He parked the vehicle at home and entered and stayed for about 25 minutes. He finished and the three of them sitting in the driver's cable drove off. Then along the road the vehicle swerved off and hit a fence and stopped in a ditch among the bushes. Many people came at the scene and the accused disappeared from the scene. The accused is the one who was handling the money throughout. The other loader also gave evidence as PW4.

PW5 was the cashier at the company. He testified that the money missing in this incident was Shs.281,662.40. The appellant gave evidence under oath which was on how he was arrested on 21/8/2006. He admitted having left employment in the month of June 2006. He denied the charge.

I have perused the evidence against the Appellant and the Judgment of the Trial Court. There is no doubt that the appellant was issued with beer which he transported in lorry KXJ 982 as a salesman to sell accompanied by two loaders Simon and Harrison and that he did sell some of the beer. Documentary evidence of the allocation of the beer were exhibits signed by the appellant. There is no doubt that the Appellant driving the said vehicle it swerved from the road and landed into a ditch where it was recovered still loaded with some bottles of beer. There is no evidence that the beer was vandalized by members of public. And it is confirmed that the Appellant never returned to the depot of his employer but was arrested on 21/8/2006 after the incident. There is overwhelming evidence here indicating that the Appellant had run with the sales for that day. That is why he never returned to his place of work. It is clear the prosecution evidence was overwhelming against the appellant and the Trial Magistrate was right in finding the case proved beyond reasonable doubt.

I do not see any merit in this appeal and the same is dismissed.

Dated this 12<sup>th</sup> June, 2008.

**J. N. KHAMINWA**

**JUDGE**

**12/6/2008**

**Khaminwa- Judge**

**Njue- Clerk**

**State Counsel.**

Read in open court.

**J. N. KHAMINWA**

**JUDGE**