



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

Criminal Appeal 276 of 2004

(From Original Conviction(s) and Sentence(s) in Criminal case No. 28484 of 2002 of the Chief Magistrate's court at Makadara (Mrs. R.N. Kimingi-PM.)

ALICE WANJIKU NG'ANG'A.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

ALICE WANJIKU NG'ANG'A is challenging the conviction entered against her by the Chief Magistrate court at Makadara, for one count of **STEALING BY SERVANT** contrary to Section 281 of the Penal Code. The particulars of the charge were as follows: -

“on diverse dates between the 13th day of August 2002 and 14th day of November 2002 at Stengata Wine and Spirits Kayole in Nairobi within Nairobi area, being a servant of MARY WANJIRU NGAHU as a sales girl, stole cash Kenya shillings 113,130/70 which came into her possession by virtue or her employment.”

The Appellant also challenges the sentence of a fine of Kshs.100,000/- and in default 12 months imprisonment.

The Appellant has raised several grounds of appeal in his filed petition which due to repetition, can be summarized as follows: -

- 1. The charge against the Appellant was defective.**
- 2. The evidence adduced by the prosecution was contradictory and also lacked corroboration.**
- 3. The Appellants defence was not given due consideration.**
- 4. The proceedings recorded by the learned trial magistrate were haphazard and incoherent.**
- 5. The sentence imposed on the Appellant was manifestly severe, harsh excessive and out of all proportions to the granting of the alleged offence.**

The facts of the prosecution case was the Appellant had been employed by the Complainant as a

counter salesperson in 1998. Her duties were to make sales to customers at the Complainant's wines and spirits shop and also supply stock to field salesmen who would later account to her and pay for sales made. One, **Wanjugu** performed similar duties as the Appellant and the two sales girls alternated their duties at the shop. The Complainant, PW1 in her evidence stated that on 13th August 2002, she and the Appellant did stock taking and discovered that stock worth Kshs.14317/- was missing. The Complainant stated that the stock taking revealed that Wanjugu, who disappeared soon after the stock taking, had stock unaccounted for worth Kshs.12,070/-. The Complainant said that the Appellant promised to pay for her loss and therefore she allowed her to continue working. However, she called in auditors, PW2, when she realized that she continued to incur loss. PW2 stated verbally what loss he arrived at for each day after he took audit. However, he did not identify in court the documents he used for the audit nor demonstrate how the figures were arrived at. The investigating officer in the case PW3 attempted to produce stock cards in court. The court did not admit the stock cards after the Appellant's counsel opposed their production on account of being photocopies. The investigating officer however produced a letter allegedly written by the Appellant in answer to one from the Complainant. In the letter the Appellant had agreed to refund loss incurred by her to the Complainant.

In the Appellant's defence she denied causing or incurring any loss at the Complainant's employee. The Appellant explained that she gave stock to salesmen who sold in the field but explained that the proceeds was never paid to her but was received by the Complainant in a safe. The Appellant stated that neither the Complainant nor the auditor explained to her how the alleged figure of loss incurred was arrived at. The Appellant stated that one **Wanjugu** also performed similar duties as her and that they worked alternately and sometimes together. The Appellant said that the Complainant, who worked throughout at the shop also did checks and ought to have noted the shortage if any, along with her shop accountant, one Winnie.

The Appellant was represented by **Mr. Ngugi** both at the trial in the lower court and on appeal in this court. **Miss Nyamosi**, State Counsel, appeared for the State and conceded the appeal. **Mr. Ngugi** challenged the figure of Kshs.113,130.70/- as loss arrived at by PW2 and submitted that the stock cards, which PW2 used to make his report, exhibit 1, were not admitted in evidence. Counsel submitted that in the absence of the primary document, the court ought not to have convicted the Appellant. **Miss Nyamosi** on her part conceded that MFI 4(a) to (e), stock cards which the auditor, PW2, relied on to make the report were rejected in evidence and in the circumstances the report ought not to have been relied on by the learned trial magistrate.

There were two issues the matter with the prosecution case. The fact that the report was based on calculations whose basis was not shown and two the fact that the stock cards which were primary document that may have formed the basis of the auditors report even though PW2 did not claim so in his evidence, were not exhibits in this case. An accused person cannot be charged for such a serious offence like **STEALING BY SERVANT** on mathematical calculations whose source is unknown and remained undisclosed throughout the trial. Neither could the auditors report, exhibit 1, been adduced in evidence not only because of lack of primary documents used to prepare the report but by reason of the fact that there was no demonstration of how the total loss was arrived at. I agree with both counsels that the auditors report ought not to have been accepted in the circumstances.

Mr. Ngugi submitted that the learned trial magistrate was wrong in her judgment when she found that the evidence of the Complainant was corroborated by that of PW2 and PW3 because the latter two witnesses merely repeated the information given to them by the Complainant. **Miss Nyamosi** did not respond to this issue. I have on my part analyzed and evaluated the evidence before the court. It is quite clear from the prosecution's case that the basis of the conclusion arrived at by both the Complainant, PW1, and the auditor, PW2, were not placed before the court. The loss the Complainant stated she discovered amounted to 14,317/-. The basis of arriving at the said figure was not explained. The auditor stated that he carried out an audit and discovered losses for several days and the total figure he discovered that was attributable to the Appellant was Kshs.113,130/70. The investigating officer on his part, PW3, found a loss of Kshs.81,120/-. None of the three witnesses demonstrated how the loss they discovered was arrived at. It is also true that each witness came up with different figures. If they were using the same documents, they ought to have explained how the figures kept changing between themselves. In any

event, PW3, the Investigating Officer said he carried out his own calculations to find a loss of 8,112/-. PW3 was not qualified to carry out an audit, and his purported exercise was uncalled for. He ought to have investigated the matter by getting qualified people to carry out what only the professional in the filed could do, for example using PW2 carrying out an audit. To answer the Appellant's advocate submission, the learned trial magistrate grossly misdirected herself when she found that the three prosecution witnesses corroborated each other's evidence. There was no corroboration at all. If anything, it was not merely contradictory evidence but disputed evidence. The prosecution failed to adduce documentary evidence used to calculate the loss allegedly incurred by the Appellant and to demonstrate how the figure of the misappropriated sum was arrived at.

The learned Appellant's Advocate challenged the court's decision to accept the prosecution evidence without documentary evidence to support it. He also challenged the learned trial magistrate's rejection of the Appellant's defence without any reasons being advanced for so doing.

Mr. Ngugi submitted that the Complainant admitted that there was another sales girl who also performed similar duties as the Appellant. Counsel submitted that no evidence was adduced to prove that the alleged misappropriation of cash was attributable exclusively by the Appellant and that also missing was the evidence to show that the rest of the co-workers were not involved. **Miss Nyamosi** for the State conceded to that ground and submitted that indeed one **Wanjugu**, who disappeared when the loss was discovered may have been the culprit. **Miss Nyamosi** submitted that the conviction was unsafe. Counsel further submitted that the learned trial magistrate, at page J8 of judgment shifted the burden of proof when she stated that the Appellant failed to give an explanation of how the money disappeared.

The burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. An accused person assumes no burden to prove their innocence or to explain anything except where the law requires it. In this case, the law did not lay any burden upon the Appellant to either give an explanation or prove a state of fact. The learned trial magistrate therefore misdirected herself when she required an explanation from the Appellant to explain the loss of the money.

The prosecution failed in its duty to demonstrate that the Appellant stole the alleged sum of money or alternatively demonstrate that it was the Appellant and no one else who could have been blamed for the loss. The evidence adduced before the court was mere allegation without proof. The prosecution relied on calculations done in the absence of the Appellant to claim that the Appellant stole the money. That evidence was not sufficient. It was incumbent upon the Complainant to bring the documents she used to carry out the stock taking which enabled her to arrive at the conclusion she did. Similarly, PW2 the auditor should have identified in court the documents he used to write his report and ought to have demonstrated to the court how he arrived at the figures he did. Without this evidence, documents and such demonstrations, the prosecution evidence remained mere allegation without cogent proof and could not have sustained a conviction.

On the Appellant's defence being rejected, having considered all the evidence of this case, I find that the Appellant's defence was quite good. The Appellant did not escape like did her colleague, one **Wanjugu**. Secondly, the Appellant's defence that she was never involved in the collection of cash was not controverted by the prosecution. In fact the Complainant did not say that the loss she allegedly incurred was in the form of cash or of stock. There should have not only been a clear explanation of what was lost but also a demonstration of the nature and manner the loss took.

Having considered this appeal and learned trial magistrate's judgment, I have come to the conclusion that the findings and conclusions of the learned trial magistrate were based on serious misdirection and non directions. The conviction was unsafe and ought not to be allowed to stand.

I will allow this appeal, quash the conviction and set aside the sentence. If any part of fine was paid by the Appellant in satisfaction of the fine imposed, the same should be refunded to her in full.

Dated at Nairobi this 22nd day of November 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant- present

Miss Nyamosi for the State

Mr. Ngugi – advocate for the Appellant

Tabitha – Court clerk

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LESIIT, J.

JUDGE