



REPUBLIC OF KENYA



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**Njenga v Republic (Criminal Appeal E027 of 2024)
[2025] KEHC 10382 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E027 OF 2024
AK NDUNG’U, J
JULY 17, 2025**

BETWEEN

ESTHER NYAMBURA NJENGA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in Rumuruti
Criminal Case No E475 of 2023– E. Kithinji RM)*

JUDGMENT

1. The Appellant, Esther Nyambura Njenga was convicted after trial of stealing by servant contrary to section 281 of the *Penal Code*. The particulars were that on diverse dates between 14/07/2023 and 31/08/2023 at Magadi trading centre in Kirima Subcounty, Laikipia County being an employee of Mwingi Kenya Limited stole assorted goods (as per the inventory) worth Kshs.74,865/- which came to her possession by virtue of her employment. On 19/04/2024, she was sentenced to two (2) years and 8 months imprisonment.
2. Being dissatisfied with the conviction and the sentence, she appealed to this court vide amended grounds of appeal filed alongside her submissions. The conviction and the sentence are being challenged on the following grounds;
 - i. The learned magistrate erred convicting her when the prosecution did not prove its case beyond reasonable doubt.
 - ii. The learned magistrate erred convicting her by relying on a single witness evidence leading to an erroneous verdict.
 - iii. The learned magistrate erred discrediting the defence and rejecting the defence testimony.
3. The appeal was canvassed by way of written submissions.



4. The Appellant submits that the prosecution failed to prove the existence of Mwingi Kenya Company Limited and PW1 failed to produce work identity card to prove that he was an employee of that company which brings the question of his credibility as a witness. Further, that PW1 conceded that there was no document to prove that she was an employee of the said company but said that he had sent pictures of the agreement to the investigating officer which was wrongly admitted as evidence as the original documents ought to have been produced.
5. The appellant adds that the prosecution failed to prove the offence of stealing by servant as the evidence was inconclusive and the victim's account of the event was suspicious and uncorroborated as it relied solely on the victim's account. The victim failed to establish how the items were stolen by her yet it was his obligation and not hers to take stock and overall account.
6. She submitted that the trial court erred convicting her on single witness evidence and the trial court failed to exercise caution and erred by pronouncing itself on a half told, half heard narrative of the alleged victim disregarding her defence. That her defence was rejected which resulted to unsafe conviction. That her defence was crucial since both the victim and her were the only independent witnesses and the trial court disregarding her testimony and evidence was unjust, unfair and prejudicial to her leading to a miscarriage of justice.
7. In rejoinder, the Respondent's counsel submitted that the Appellant admitted that she was an employee of Mwingi Kenya Ltd which was in tandem with PW1's evidence that indeed she was an employee of the said company. PW2 also produced an agreement proving the Appellant's engagement with the complainant. That having admitted to be an employee, she is therefore estopped from denying the fact of her employment. Reliance was placed on the case of *Mathenge v Republic* (Criminal Appeal E013 (57) of 2020) [2023] KEHC 25295 (KLR) where the court stated that admission of employment was proof that the Appellant therein was an employee. Further, it was not in doubt that she came into possession of good belonging to the complainant and the fact that there was a shortage was proved through Exhibit1. As to who was to blame for the shortfall, he submitted that it was common ground that the person at the shop would be responsible for any loss which she conceded during cross examination.
8. Counsel submitted that Appellant's defence was an admission as she admitted that she was an employee and that if the stock got lost, the shop attendant would be responsible. The rest of her defence was fanciful as the allegation of frame up was never put to PW1 during cross examination. The allegation that she used to do a daily stock count on her phone was not substantiated with evidence hence she did not controvert PW1's evidence that he conducted a stock count and ended up with a short fall. With respect to sentence, he urged the court not to interfere with the discretion of the trial court as the sentence of 2 years was lenient and it was not automatic that the Appellant would be admitted to a fine as section 281 does not provide for the option of a fine.
9. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
10. The evidence before the trial court was as follows. PW1, a stock taker with Mwingi Kenya Company Limited, testified that his duty was to reconcile physical stock in the shop against the stock in the company system. He had no employment ID. The Appellant was their employee, a shop attendant at Survey shop at Magadi Trading centre. That there was no document in the file to show that she was their employee and that he had sent the documents to the investigating officer via phone. That on 31/08/2023, he did a stock take and found there was a variance of stock as the stock was not physically in the shop as she had sold it. She had sold goods worth Kshs.77,395 but cash on hand was Kshs.2,500/-.



- He asked about the balance of Kshs.74,865/- and she said that she had sold on credit and had taken the money. She said that the credit customers would not pay. They reported the matter. He testified that the stock sheet, employment documents and audits were given to the investigating officer but were not in the file.
11. On cross examination, he testified that stock was taken on 31/08/2023 and the matter was reported on 1st September and shop was closed in her presence, her mother and the police. That the shop was opened after stock take and the report of which was signed by her. He testified on re-examination that there was no agreement.
 12. PW2 the investigating officer testified that the shop belonged to Mwingi Traders and PW1 conducted book reconciliation and discovered that money and stock totalling Kshs.74,865/- was missing. When the Appellant was asked about the loss, she could not give an answer. He produced the stock count sheet as Exhibit1 and an agreement showing that the Appellant worked with Mwingi Traders as Exhibit2.
 13. He testified on cross examination that the documents were supplied by the owner of the company. He did not forge the documents nor her signature. The documents were supplied by PW1.
 14. The Appellant in her sworn defence testified that from 13/07/2023, she was selling at Mwingi shop and would send money on daily basis to the company till number. On 31/08/2023, PW1 went to the shop to do stock count and everything was okay. He knew that they had goats and maize at home and asked her that if he found a stock shrinkage what she was going to do. He went to a neighbour's shop and upon return, he told her that there was Kshs.74,000/- missing. He asked her to sell maize and goats to make up for the loss but she refused. He locked her inside the shop and informed her that he was the only one who could fix her work or destroy it. He told her to choose between her parents selling the maize and goats and he be given the money or be in a relationship with him and if she refused, the case was to proceed. She refused and he reported the matter and she was taken to police post.
 15. She testified that PW1 through the police asked for Kshs.30,000/- for her to be set free. She did not give him the money. That PW1 informed the court that there was no stock count sheet and the employment letter in the file and claimed that he sent the documents to the investigating officer via phone. That he forged the said documents as he did not have them before.
 16. On cross examination, she testified that she did not produce any document to show her signature and her handwriting. That she was not there when the documents were allegedly made. That the police asked for Kshs.30,000/- for her release but she did not know whether it was a bribe or cash bail. That she was employed in July 2023. That the person employed at the shop was to blame if something went missing in the shop and she was employed there. That she told PW1 that there was no missing money as she calculated the amount every day. That she used to type the stock on daily basis and calculated on her phone every item and the corresponding kg using the mobile App provided by the company which was on the company phone and that PW1 took the phone immediately.
 17. That she did not cross examine PW1 about the App and did not ask him about the romantic advances during cross examination. That she did not know whether PW1 investigated about her personal background and that her home was about 1 Km from the shop so people who were near the shop were in a position to know her personal background. That after he closed the door, she screamed and people gathered outside and he opened when the police officer arrived though none of those people were her witness. That she did not mention people gathering outside the shop and did not question PW1 on the same. That she reported to the police and it was entered in the OB. That Mwingi company had franchise shops but she was the only one who was accused of those charges.



18. I have had occasion to consider the evidence adduced at the trial court. In so doing, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the applicable law, the submissions made and case law cited. Of determination is whether the prosecution proved its case to the required degree.
19. The offence of Stealing by Servant is created in Section 281 of the Penal Code. The provision states as follows: -

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.
20. The ingredients of this offence are proof of employment and proof of theft of the employer's property which may have come into possession of the offender by virtue of the employment.
21. In Bilali v Republic (Criminal Appeal E018 of 2023) [2024] KEHC 4998 (KLR) the court emphasized that;

“To secure a conviction under the above section, the prosecution must prove stealing also known as animus furandi or fraudulent conversion. It must also be proven that the stolen items belonged to the employer and that the offender is a clerk or servant. Further, the prosecution bore the burden to proving its case against the appellant beyond reasonable doubt.”
22. On the first issue, there is no doubt that the Appellant was employed by the Company. The appellant admitted as much in her testimony when she testified that she was selling at Mwingi shop and she started selling on 13/07/2023. She also admitted that PW1 went to the shop to do stock count on 31/08/2023. She confirmed this even during defence case.
23. As to whether the second element of the offence was proved, PW1 testified that he conducted a stock take on 31/08/2023 and found that there was variance of stock since the stock was not physically in the shop and the Appellant had not sold it. He testified that the Appellant had sold goods worth Kshs.77,395/- but the cash at hand was Kshs.2, 500/- and she could not account for the balance of Kshs.74,865/-. When asked, she informed him that she had sold goods on credit and she had taken the money. She further informed him that the credit customers would not pay. He told the court that he gave the stock sheet among other documents to the investigating officer but they were not in the file. He further testified they would give a phone with POS-point of sale.
24. The Appellant on the other hand denied committing the offence. She testified that everything in the stock was okay. That she used to send money on daily basis through the phone to the company's till number. She testified on cross examination that she would take stock count on daily basis on her phone and every item and the corresponding kgs using the mobile App provided by the company. That it was calculated directly on the phone App and that the mobile phone belonged to the company and the phone was taken immediately by PW1. She testified that the documents that were produced by PW2 were forged since PW1 testified that they were not in the file.
25. I have considered the testimony by the complainant and the Appellant. It was the duty of the prosecution to prove that the Appellant, in her position as the employee of Mwingi Kenya Company Limited, stole the alleged stock. It is noted that PW1, testified that the stock sheet that he took was not in the file and even the employment agreement. He testified that he sent the same to the investigating officer. PW2 the investigating officer produced the stock sheet as Exhibit 1 and employment agreement



as Exhibit 2. These documents were not identified by PW1 raising the question whether they were doctored or manipulated or introduced after PW1 mentioned them when he was testifying.

26. I have also perused the said documents and I have noted that copies were produced. The original documents were not produced. In *Jane Wambui vs Stephen Mutembi & another* [2006] eKLR the court had the following to say;

“under section 67 of the *Evidence Act*, Cap 80, documents must be proved by primary evidence except in cases set out in section 68 of the Act where secondary evidence may be given of the existence, condition, or content of a document. The definition of primary evidence is to be found in section 65 of the same Act. Generally speaking, primary evidence means document itself produced for the inspection of the court”

27. And in *Lwangu v Ndote* [2021] KEELC 2 (KLR) the court held that;

“Section 67 of the *Act* is couched in such a manner as to make it mandatory for documentary evidence to be produced in its primary form unless the secondary evidence thereof it falls among the exceptions provided in the *Act*. It states “Documents must be produced by primary evidence except in the cases hereinafter mentioned.” This forms the basis of the best evidence rule. Thus, by virtue of the provision, a party has no option but to either avail the document itself or bring himself within the exceptions given in the law. The plain grammatical meaning of the word “must” is that it is “mandatory” to produce primary evidence except as provided. There is no room for maneuver. That mandatory requirement then attaches to placing oneself within the exceptions if there could be an ‘escape’. It therefore follows that where a party fails to produce primary evidence, the document, however crucial it to his case, any other form thereof should neither be accepted in evidence nor relied on by the court. In arriving at that conclusion, I bear in mind the constant reminder that rules (of evidence and procedure) are not made in vain: they are to be followed.”

28. This also applies in criminal cases. The provisions of section 68 of the *Evidence Act* provide for instances when copies of documents can be admitted in evidence. None of the conditions in that section were met to enable the court to proceed as it did.

29. In the absence of the original documents, the copy of the stock sheet was therefore inadmissible. In any event the investigating officer had no capacity to interrogate and explain satisfactorily the contents of the stock sheet and any discrepancy thereon. The identification of the documents and the necessary explanation as to the nature of loss complained of certainly rested with the company, in this case its representative, PW1. In a strict sense, the evidence of PW2 is tantamount to hearsay as he was not in a position to explain the complainant company’s processes in sales, dispatch of proceeds of sale or stock receipt by specific shops and stock taking.

30. It requires no belaboring that the burden of proof in a criminal case is on the prosecution. This burden stays with the prosecution throughout. It is never shifted to the Appellant as an accused person. This principle was re-emphasized by Nyakundi J in the case of *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, where the learned judge stated;

“It is the law in Kenya as entrenched in the *Constitution* under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The *Evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus: “whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he



asserts, must prove those facts exist.”As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

31. In the present appeal, my re-evaluation of the evidence tendered at trial fell short of proving the charge. The criminal case turned on the documentary evidence recording the stocks and any discrepancies thereon. The availed evidence was in the first place inadmissible. Secondly, it is produced by a witness who could not vouch for it, he not being an agent of the company with inside knowledge of the company’s operations. Indeed, the said documentary evidence was not identified by PW1 who stated clearly in his testimony that the documents were not in the file! In light of the foregoing, I reach the conclusion that the said evidence was of the weakest nature and could not sustain a conviction.
32. With the result that the appeal herein is wholly successful. The conviction by the trial court is hereby quashed and the sentence set aside. The Appellant is to be set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JULY 2025.

A.K. NDUNG’U

JUDGE

