



**Kibet v Republic (Criminal Appeal 111 of 2023)
[2024] KEHC 1451 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 111 OF 2023
DR KAVEDZA, J
FEBRUARY 19, 2024**

BETWEEN

DANCUN KORIR KIBET APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. M. Maroro (PM) on 13th February 2023 at Kibera Chief Magistrate's
Court Criminal Case no. 1481 of 2018 Republic vs Dancan Korir Kibet))*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of stealing by servant convicted for the offence of stealing by servant contrary to section 268 as read with section 281 of the [Penal Code](#), Cap 63 Laws of Kenya. He was convicted to serve four (4) years imprisonment in addition to reimbursing the complainant the sum of Kshs. 1,901,987/=. Being dissatisfied, he filed an appeal challenging his conviction and sentence.
2. In his appeal, he raised, thirteen grounds which have been summarised as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court erred in convicting him without giving him an opportunity to be heard. He argued that the sentence was harsh and the court erred in making an order of restitution against him.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs Republic* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.



4. For the prosecution to prove the charge of theft by servant, it must establish the following: that the Appellant was an employee of the complainant, that the Appellant stole the property of the employer that came to his possession in the course of the employment, and finally that the appellant dishonestly appropriated the said property thereby depriving the employer of the same.
5. Asenath Cheron, PW 2 the Finance Manager, presented the appellant's employment contract. The appellant managed system posting and cheque writing, with exhibits showing payments of Kshs 1.5 million. This confirmed that the appellant was indeed an employee of the complainant Sunshine Secondary School. She testified that the external auditor discovered a discrepancy of Kshs. 1,901,987 and the appellant admitted to paying back Kshs. 400,000 in 2018.
6. Pw1, the accountant at Sunshine Secondary School, testified that during the bank reconciliation for account number 11835007 at Transnational Bank, discrepancies were found between the cash book and bank statements. An example highlighted a cash book entry of Kshs 7,000, while the bank statement showed Kshs. 70,000, leading to suspicions. Pw1 reviewed transactions, revealing a missing Kshs. 1.9 million from May to October 2017, with the appellant handling payments.
7. Daniel Kipkemai Sogut, Pw3 reported discrepancies to the board and police, mentioning anomalies in cheques. Pw3 confirmed the appellant as the cheque beneficiary and disclosed the appellant's confession at the police station. An audit from February to October 2017 was conducted.
8. Pw4, Susan Asere a registered Certified Public Accountant and auditor, confirmed the appellant's responsibility for payments. Pw4 noted cheque alterations without establishing the timing of the changes. Pw1, in re-examination, asserted that the appellant altered cheques after their signing.
9. PW 5, the investigating officer Alex Mulama, testified that external auditors were enlisted to provide a report on the school accounts. He proposed that both the appellant and Asenath (Pw2), the finance manager, should face charges for the offense. Pw5 concluded by affirming that the appellant was implicated as part of the syndicate involved in the crime.
10. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. However, he absconded and the defence case was closed. He was convicted and sentenced accordingly. In his appeal, he challenged the decision by the trial court in closing his defence without affording him an opportunity to be heard.
11. From the record, I note that when the matter came for defence hearing on 5th July 2022, he was not present and a warrant of arrest was issued. After five mentions, judgement was delivered in the appellant's absence. The warrant of arrest remained in force. The contention now raised, asserting a denial of the opportunity to be heard, is legally untenable, given that the appellant wilfully evaded court proceedings. The ground therefore fails.
12. The appellant also challenged the totality of the prosecution's evidence against which he was convicted. He contended that the prosecution did not prove the case beyond reasonable doubt. In addition, the ingredients of the offence of stealing by servant were not established.
13. It is not disputed that the appellant was employed by Sunshine Secondary school as an accountant. This was confirmed by Pw 2, the finance manager at the school. During his employment, PW 1, Raphael Kipsang also an accountant, noticed discrepancies in the accounts. The discrepancies were reported by PW 3 to the Board. PW 4, noted cheque alterations without establishing the timing of the changes. Pw1 implicated the appellant in the alteration of cheques after their signing. The investigating officer contended that the appellant was not the only one culpable but was part of a syndicate also involving PW 2, the finance manager.



14. Section 108 of the [Evidence Act](#) Cap 80 (Laws of Kenya) provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Further, Section 109 of the [Evidence Act](#) stipulates that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

15. Notably, the appellant did not deny having been employed by Sunshine Secondary School as an accountant. His duty involved managing the account system and writing of cheques. In the course of his duties, the appellant altered cheques leading to discrepancies in bank reconciliation, with a substantial sum of Kshs 1.9 million missing from May to October 2017, directly involving the appellant in payment transactions. The appellant was also implicated as the beneficiary. Additionally, PW 4, affirmed the appellant's responsibility for payments, noting cheque alterations. Collectively, this evidence establishes the appellant's culpability in the theft.

16. Having critically analysed the evidence on record, this court was satisfied that the Learned Trial Magistrate did not err when he convicted the Appellant for the charged offence.

17. On sentence, the appellant was sentenced to serve four (4) years imprisonment in addition to an order to reimburse the complainant the sum of Kshs. 1,901,987. The appellant argues that the trial court overlooked the Kshs. 400,000 was repaid to the complainant in 2018. Furthermore, the basis for arriving at the specified amount of Kshs. 1,901,987 remains unclear, as no submissions were filed, and the prosecution did not provide an itemization. Additionally, it is asserted that there is no evidence demonstrating that the appellant wrongfully appropriated the mentioned sum.

18. Section 281 of the [Penal Code](#) Cap 63 (Laws of Kenya) provides that:

“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.”

19. The offence the Appellant was charged with carries a maximum sentence of seven (7) years imprisonment. In the circumstances of the case, the sentence of four (4) years imprisonment was therefore legal.

20. On whether the order of restitution was proper, It is worth noting that, such would be the appropriate case for the trial court to order restitution under section 178 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya. From the record, PW 2 verified that the appellant had already repaid Kshs. 400,000 of the stolen funds. The trial court should have taken this repayment into account when issuing an order for restitution. Moreover, this payment demonstrates the appellant's willingness to compensate the complainant.

21. Consequently, I find that the appellant's sentence was harsh and excessive. The appeal against conviction is found to be lacking in merit. The appeal on sentence partly succeeds. The sentence of four (4) years imprisonment is substituted with an order of probation for three (3) years in addition to the repayment of the sum of Kshs. 1,501,987 to the complainant.

Orders accordingly.



JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF FEBRUARY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Kipruto for the Applicant

Ms. Ntabo for the Respondent

Joy Court Assistant

