



REPUBLIC OF KENYA



KENYA LAW
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**Bilali v Republic (Criminal Appeal E018 of 2023)
[2024] KEHC 4998 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E018 OF 2023
RE ABURILI, J
MAY 13, 2024**

BETWEEN

FARIJALA MWINYI BILALI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. C.N.C Oruo on the 5th April 2023
in the Senior Principal Magistrate's Court in Winam in Criminal Case No. E 670 of 2021)*

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of stealing by servant contrary to section 281 of the *Penal Code*. The particulars of the offence were that on diverse dates between 2nd August 2020 and 2nd December 2020 at Multi Energy Company along Kondele Mamboleo road within Kisumu County in Nyanza Region, the appellant being a servant of Multi Energy Company stole 119 of 6kgs empty gas cylinders, 12 of 13 refilled Mengas cylinders, 13kgs empty Mengas gas cylinders and Kshs. 123,000 all totalling to Kshs. 320,000 the property of Multi Energy Company which came into his possession by virtue of his employment.
2. The trial court after considering the evidence presented by the prosecution as well as the appellant's defence before the trial court found that the prosecution had proved their case against the appellant beyond reasonable doubt and that the appellant's defence amounted to a mere denial. The trial court proceeded to sentence the appellant to serve imprisonment for 5 years.
3. Aggrieved by the trial court's finding, the appellant filed his petition of appeal on the 15th August 2023. The grounds of appeal are;



- i. That the trial magistrate's decision was against the weight of evidence adduced before him by the appellant.
 - ii. That the trial magistrate erred in law by relying on a contradictory evidence of the prosecution witnesses.
 - iii. That the trial magistrate erred in law by failing to analyse all the evidence tendered by the appellant before court.
 - iv. That the trial magistrate's decision was arrived at cursory and perfunctory manner and was bias.
 - v. That the trial magistrate erred in law and fact by not considering the evidence of appellant.
 - vi. That the trial magistrate erred in law and fact by law and fact by law failing to consider the appellant alibi evidence.
 - vii. That what I have deponed here is true to the best of my knowledge information and belief.
4. The parties made both submissions in disposal of the matter, with the appellant opting to make both oral and written submissions while the respondent only made oral submissions.

The Appellant's Submissions

5. It was the appellant's submissions that the inventory was availed when he was already in court and that this meant that it was not available when he was charged with the offence.
6. The appellant submitted that the case was fraught with contradictions and inconsistencies that could not warrant the upholding of a positive judgment. The appellant emphasized that the judgement provided that the properties were lost in Kisumu County while at page 5 of the same judgement it provided that the properties were stolen in Webuye, Bungoma County yet he was charged in Kisumu County.
7. The appellant further submitted that the ingredients of the offence were not proven beyond reasonable doubt and thus the learned trial magistrate erred in convicting and sentencing him.
8. It was submitted that the trial magistrate erred in law and fact in analyzing and evaluating the case before him by laying the burden of proof on him contrary to the established principle in criminal law that requires the respondent to prove their case beyond reasonable doubt. The appellant further submitted that the trial magistrate ignored his defense.

The Respondent's Submissions

9. The respondent submitted that the conviction was sound and sentence was lawful. It was further submitted that the issue of employment of the appellant was proved and further that the ingredients for stealing by servant were proved.
10. The respondent submitted that PW3 produced an inventory of missing stock and mpesa statements from Webuye Depot where the appellant worked.
11. It was submitted that the sentence of 5 years' imprisonment was lenient as the appellant could have been sentenced to seven years and as such the sentence meted out ought to be upheld.



Analysis and Determination

12. I have considered the grounds of appeal and submissions above. The duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
13. The following issues flow for determination:
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt.
 - b. Whether or not in the circumstances of this case, the sentence that was meted out upon the Appellant by the Trial Court was manifestly excessive
14. On whether the prosecution proved its case beyond reasonable doubt, Section 281 of the [Penal Code](#) under which appellant was charged 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 imprisonment of seven years.”
15. 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 of proving its case against the appellant beyond reasonable doubt. That standard of proof was discussed in the case [Gordon Omondi Ochieng v Republic](#) [2021eKLR] as follows:

“31. And in *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

‘Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.’” (emphasis)
16. Stealing is defined in the [Black’s Law dictionary](#) 8th Edition as:

“To take (personal property) illegally with the intent to keep it unlawfully”.



17. The definition of stealing as found in section 268 of the *Penal Code* is:

“ A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.”
18. The element of the appellant’s employment by the complainant, Multi Energy, is undisputed. The appellant admitted as much in his testimony in cross-examination. Despite his testimony that he did not sign an employment contract, the prosecution adduced details of the appellant’s bank accounts to confirm that he was being paid by the company, Multi Energy, the complainant herein.
19. Did the prosecution prove beyond reasonable doubt that it was the appellant who stole the goods alleged by the complainant in the charge against him?
20. The charge against the appellant was that he stole 119 of 6kgs empty gas cylinders, 12 of 13 refilled Mengas cylinders, 13kgs empty Mengas gas cylinders and Kshs. 123,000 all totalling to Kshs. 320,000.
21. PW1, Mohammed Mohammud Issa testified that the appellant was initially employed at the Kisumu Depot before being transferred to the Webuye Depot where he was charged with handling all stores, remitting cash sales and administrative duties in the depot. It was PW1’s testimony that as at December 2020, following stock taking at the Webuye depot, the appellant could not account for 12 pieces of 13kg gas cylinders, 119 pieces of the 6kg gas cylinders and 11 pieces of empty 13kgs gas cylinders all totalling to Kshs. 197,880.
22. PW1 further testified that he was tasked with making a report on the same and concluded that the appellant had not accounted for a total of Kshs. 320,880 which included missing money from the Webuye depot. PW1 further testified that there was a customer who raised a query on account of not having received gas which he had paid for. PW1 reiterated his testimony in cross-examination.
23. PW2, Maurice Otieno Okuku admitted that the appellant was his colleague and that he had on various occasions delivered gas cylinders to the appellant at the Webuye depot and further picked empty gas cylinders from the same depot. He testified on the various deliveries, he made from starting in August through to December.
24. PW3 Eunice Moniya Abel an accountant at Multi Energy testified that the appellant was a colleague. It was her testimony that the appellant failed to return stock in August 2020 when a new system was started by the company. It was her testimony that the gas cylinders missing were worth Kshs. 197,880.
25. In cross-examination, PW3 reiterated that the appellant had variances in the sales and mpesa sums collected as well as physical variance in the amount og gas cylinders delivered from the company and those sold by the appellant.
26. PW4, the Investigating officer testified corroborating the testimony of the preceding prosecution witnesses. He testified that the appellant was arrested at the Webuye depot on the 29.12.2020 following a report made at Kondele Police Station on the 16.12.2020 by the company.
27. PW4 further testified that the appellant had also obtained money from a customer for Kshs. 43,020 to deliver gas which he failed to do forcing the company to make the delivery from its Kisumu depot. In cross-examination, PW4 testified that the appellant could not account for both missing funds collected from sale of gas cylinders or gas cylinders delivered by the company.
28. Placed on his defence, the appellant denied committing the offence he was charged with. The appellant stated that the inventory was made in October 2021 and that the charges read against him having been



stated to have been committed between August 2020 to December 2020 rendered the charge sheet brought against him defective.

29. In cross-examination, the appellant testified that he learned about the default in gas cylinders in December 2022. He denied giving away cylinders to the landlord of the Webuye Depot in lieu of rent and further that he gave 27 gas cylinders to customers. He admitted that he worked for Multi Energy, the complainant, though he did not sign any employment contract.
30. I have analyzed the evidence before the trial court. There is no doubt that deliveries of gas cylinders were made to the appellant and he signed as having received the same as was evidenced from the various delivery notes produced by the prosecution. PW3 further testified that the appellant failed to return stock in August 2020 as was the norm. She further testified that following a delivery made on the 2.12.2020, there was an offload of gas cylinders at Webuye Depot as evidenced by delivery note 5748. PW3 testified that following their reconciliation, they noticed that gas cylinders worth Kshs. 197,880 were missing and that in addition to M-pesa statements, the total amount that was missing from the Webuye depot was Kshs. 320,880.
31. I have considered the evidence adduced by the appellant in his defence and as I observe that he was under no duty to establish his innocence or say anything in defence, however, that defence amounts to a mere denial.
32. A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the owner of it. This constitutes the actus reus of the theft, mensrea is then deduced from acts of dishonestly which manifests criminality. The appellant failed to keep proper records as from August 2020. Even when confronted by his employer, the appellant offered no solution to the issues raised.
33. In this case, I find that criminal liability was proved. The appellant's defence was not plausible. The defence of the appellant was a sham and it was property rejected by the trial magistrate. I find that the prosecution discharged its burden to prove the charge against the appellant beyond any reasonable doubts.
34. The appellant cited contradictions and inconsistencies that could not warrant the upholding of a positive judgment however from my evaluation of the evidence presented by the prosecution in the trial court, it is my opinion that the same, if any, are not sufficient to warrant the overturning of the trial court's judgement. This court agrees with the hold of the Court as held in *Philip Nzaka Watu v Republic* [2016] eKLR thus:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elai Nsamba Shapwata & another v. The Republic*, CR APP. NO. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court



has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

35. In the present appeal, any inconsistency and contradiction in the oral evidence adduced by the prosecution witnesses was resolved by documentary evidence which connected the Appellant to the theft.
36. It is clear from the foregoing that the appeal on conviction lacks merit. It is hereby dismissed.
37. Turning to the appeal on sentence, 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.”
38. 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 five (5) years imprisonment was lenient. This court is thus not persuaded that it should interfere with the same, the appellant having failed to live up to the trust bestowed upon him to protect the property of his employer.
39. For the foregoing reasons I find this appeal vide Petition dated 14th April 2023 is devoid of any merit and the same is hereby dismissed. The Appellant’s conviction and sentence be and are hereby upheld.
40. Signal to issue
41. This file is closed.
42. The lower court file to be returned with a copy of this judgment.
43. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE

