



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Republic (Criminal Appeal 60 of 2018)  
[2023] KEHC 1943 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 60 OF 2018  
JM CHIGITI, J  
MARCH 15, 2023**

**BETWEEN**

**SARAH NJERI NJUGUNA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Gatundu (Hon. E. Nyongesa, SRM) delivered on 18th September, 2018 in Gatundu SPMCR No. 468 of 2014)*

**JUDGMENT**

**Brief background:**

1. The Appellant was charged with the offence of theft by servant contrary to Section 281 of the [Penal Code](#) per the particulars of the offence.
2. It is alleged that “on the diverse dates between October 2013 and April 2014 at Kairi Shopping Centre in Gatundu North Sub County within Kiambu county, being a servant to Leghorn Feeds Company stole Cash Ksh. 223,800/= the property of Leghorn Feeds Company which came into her possession of virtue of her employment.”
3. The prosecution proceeded for hearing before Hon. E. Nyongesa.
4. After the witnesses testified, the trial magistrate found the Appellant guilty and sentenced her to pay Kshs.150,000/= in default to serve 3 years imprisonment.
5. Being dissatisfied with the judgment, the Appellant filed the instant appeal on February 26, 2019 via the Memorandum of Appeal dated September 28, 2018. The parties agreed to dispense off the appeal by way of written submissions.



## Analysis and determination:

6. The role of the first appellate court was set out in the case of *Okeno vs. Republic* [1972] E.A 32 as follows;

“It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses...”
7. According to the Appellant, PW1 confirmed that she worked for Leghorn Feeds International Ltd and not Legon Fees Company. She raised issues because the charge sheet talks of Leghorn Feeds Company. To me this would appear to be a curable oversight that doesn’t go to the substance of the appeal. In any event, the appellant did not raise this concern when the matter proceeded in the trial court. She will suffer no prejudice if the court reads the two names to mean one and the same company as set out in the charge sheet.
8. She cross examined the prosecution witnesses without any problem. During the cross examination, she confirmed that she was employed.
9. The Appellant submits that a delay in delivering the envelop that had money does not amount to theft.
10. According to PW1, the Appellant failed to account for one bag valued Kshs.2000. He noticed a difference in the number of bags for November being 12 bags layers mash and 9 for growers. He further told the court that the sum of Kshs.223,800/= could not be accounted for.
11. During Chief examination, PW1 told the court that the accused used to sign for the deliveries made to the company. He complained that there was a shortage of stock between the time of opening and closing. He testified that the company suffered a stock shortage in the month of October, 2014 worth the sum of Ksh. 52,450 and that in November, 12 bags of layers mash could not be accounted for. In December, he told the court that there was a difference of 415 bags.
12. In January, he told the court that there was a balance of 36 bags worth Kshs.95,150/= unaccounted for. He told the court that the above plus the deficits he analyzed during Chief examination amounted to Kshs.223,800/=.
13. During cross examination, the Appellant confirms that there were sales that she did without records.
14. PW2 confirmed that the Appellant used to receive the deliveries alone. He confirms that there were two deliveries for the month of February and that on 13<sup>th</sup> February, 2014 a delivery was done by Motor vehicle registration no. KBB 276A of 25 bags of layers of 70 kg each. In cross examination, he confirms that his work was to deliver.
15. PW3 confirmed that he used to deliver bags of layers mash, growers mash and that on December 2, 2013, December 28, 2013 and January 21, 2014 he made a delivery that was received by the Appellant the complainant’s depot in Kairi. Like PW2, he did not see the Appellant stealing.
16. During cross examination DW1 confirmed that she was employed by the complainant. She confirmed that she never used to count the goods because she trusted her colleagues. She said she just used to sign the delivery notes because she was busy at the shop.
17. She testified on oath that whenever goods were offloaded at the shop, she never used to count them. She further testified that she never used to get the deposit slips after deposits were made. She testified



that Harrison also used to have the keys. She told the court that some of the money was out in the customers who had purchased the goods on credit.

18. The accused does not deny that she never kept track of the deliveries, the bank deposit slips and she casually tells the court that some of the funds were out with clients. From this, I am satisfied that she committed the offence of theft by servant.

19. Section 281 of the [Penal Code](#) sets out the offence of stealing by servant in the following terms.

“Stealing by clerks and servants 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. From the nature of the transactions and activities of receiving goods for the complainant, the handling of the banking for the complainant and from the fact that she was well known to the prosecution witnesses who worked with her and from her testimony, I am satisfied that the Appellant came into possession of the was a servant of the complainant.

21. I find that the prosecution has proven that she committed the offence of theft by servant contrary to Section 281 of the [Penal Code](#).

22. I find no reason to interfere with the conviction and the sentence.

**Order:**

The appeal lacks merit and the same is dismissed.

**DATED AND DELIVERED AT KIAMBU THIS 15<sup>TH</sup> DAY OF MARCH 2023.**

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**J. Chigiti (SC)**

**Judge**

