Chikutwa v Republic (Criminal Appeal E066 of 2021)
[2023] KEHC 18891 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18891 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E066 OF 2021

JRA WANANDA, J

JUNE 16, 2023

BETWEEN

CHEMIA CHIKUTWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant and a co-accused were charged in Eldoret Chief Magistrates Court Criminal Case No. 2526 of 2018 with the offence of stealing by servant contrary to Section 281 of the *Penal Code*. This Appeal is against the conviction of the Appellant and the sentence of 2 years' probation imposed against him for the said offence.

2. The particulars of the offence were that on diverse dates between 2/10/2017 and 3/11/2017 at Chepkoilel junction in Eldoret Township in Eldoret West sub-County within Uasin Gishu County, jointly with others not before Court, stole 82 bags of maize valued at Kshs 188,600/- from Ineet Millers, the property of one Kenneth Kipngetich Mutai, which came into their possession by virtue of their employment.

3. The Appellant and his co-accused pleaded not guilty and the matter then proceeded to trial. The prosecution called 5 witnesses and the defence called 4, including the Appellant and his co-accused.

Prosecution evidence

4. PW1 was one Kennedy Mutai. He testified that he is a shareholder and director of Ineet Millers which grinds maize, he had worked with the accused persons since 2013 when they started the factory, on 3/11/2017 he was informed by his neighbour that there was theft going on in the factory, that neighbour is one David Ochieng who lives behind the factory and he too was informed by his watchman, PW1 then put people to help since he did not trust the partners, he got 2 people, Philip and Andrew who do not work in the factory to survey the happenings, on 3/11/2017 they told PW1

that there was theft of maize that night, a worker was throwing maize on the other side of the factory and a motorbike was ferrying it, PW1 then did stock-taking with his Accountant and found that 82 bags of maize were missing, they lost about Kshs 188,000/-, his Manager then went to report at Central Police Station at Eldoret, they wrote Occurrence Book (OB) No. 15/11/17, the police investigated, the Appellant was identified , he was on shift on that day, the position that PW1's informant was in enabled him to identify the accused persons, PW1 has not had a misunderstanding with the accused persons before, the Appellant was in the packaging section and his co-accused was the operator.

5. In cross-examination, he stated that the Appellant filed a case at the Employment & Labour Court on 11/05/2018 and the criminal charges before the trial Court were brought on 19/06/2018, Edward Ochieng who was the informer is not a witness in the criminal trial, PW1 used to be in business with the other informant Philip who used to buy things from PW1's factory, PW1 was not at the scene and was only told, the fence covering the concerned side of the factory is "mabati" (iron sheets), it was 2½ metres high, it was 82 bags that were lost, there is a camera in the factory, there was a security guard at the time of the offence, he was arrested but was not charged, the bags were stolen on 3/11/2017 and was reported on 15/11/2017, investigations were still taking place. In Re-Examination, he stated that he told the Appellant to come back to work and if he is found guilty then he will deal with the consequences

6. PW2 was Anthony Kipkemoi. He stated that on the relevant date he and one Kipkemboi Kogo while outside at around 2.30 am saw a motor cycle with 2 people being parked, 2 people were throwing luggage from inside the fence, others were receiving it from the other side and putting it on the motorcycle, the luggage was parked in sacks, there are security lights, he saw the person who was throwing it and also the person who was on the motorbike, they were wearing Ineet Millers uniform, he knew them by their faces, the Appellant was the one who was throwing and the other was outside.

7. In cross-examination, he stated that they were hiding behind a church, about 10-15 metres away, there was a "mabati" (iron sheets) fence, there are lights, he did not know them at the time of the offence, the number plate of the motorbike was hidden, he did not know the person who was riding but he was wearing a black jacket, they identified the accused persons, he could not tell how many they were, they were afraid to raise the alarm, there is a watchman at the company but they did not inform him, they reported to Tarus, the motorcycle was carrying 4 bags, he had seen the co-accused before at Ineet, he identified him but he did not however know his name. In Re-Examination, he insisted that the lights were very clear and he could therefore see the faces of the accused.

8. PW3, Philip Kogo testified that in October and November 2017 he used to take animal feeds to the company, a friend called by the name Kirigo told him that something was going on at the factory, the owner asked him to try to prove, he then went to sleet at Kirigo's who lives behind the factory so that he could investigate, in the middle of the night he heard the sound of a motor bike, he went outside to check and saw the Appellant carrying luggage, the Appellant had to stand on a stone so that he could throw luggage, they were two people but he could recognize one, he knew the Appellant before the case, it was around 2 am, there was too much light, there is a church and a hospital around there, he was standing about 20 metres apart, he called the owner of the factory, the following day he went to the police. In cross-examination he stated that the things were being thrown by 2 people but he could only see one.

9. PW4 was Evans Onyango Odungo. He stated that he is an Accountant, he did stock-taking at Ineet Milers for the period 1st - 31st October 2017, at the beginning the bags were 933 but at the time of closing stock it was 851 bags, there was therefore a deficit of 82 bags.

10. PW5 was Police Officer Esther Mbidi. She stated that a Report was made on 15/09/2017 by Inet Millers that on the midnight of 3/11/2017 the director of the company received a call about a theft from his informers whom he had earlier instructed, PW5 visited the scene, she found that 2 employees had deserted work, she recorded statements from witnesses who had identified the employees since they were adjacent to the company, he advised the Director to get an audit Report, he arrested the suspects and charged them. In cross-examination, she stated that she visited the scene on the basis of the Report made by one Kiprono Kosgei who was a manager at the company, she did not however see the necessity of writing his statement, she chose the Director to write a statement, the offence was committed during midnight, an identification parade was not conducted, the alleged stolen bags of maize were recovered but not in the possession of the accused persons.

11. At the close of the prosecution case, the Appellant and his co-accused were found to have a case to answer and were placed on their defence.

12. The Appellant then elected to give sworn testimony as DW1. He testified that he had worked at the company from February 2014 to November 2017, on the relevant day he was called by the manager Joseph Tarus who opened a CCTV clip, it showed the Appellant going to the toilet but did not show the time, it showed a motorcycle, DW1 did not know the motorcycle or the rider, a police officer who was present told DW1 that he had stolen, he was however not taken to the police station, the manager told him never go back to work, he later went to his employees' union which wrote a demand letter to the company, a meeting was later held, it was agreed that he be paid his final dues, he has not been paid to date, he decided to go to the Labour Court and filed a suit, further meetings were held but no agreement was reached, later the Director asked him to return to work but he refused, on 14/06/2018 the Director came to where DW1 had secured another job, he came with 3 people, they arrested him and took him to the police station, he was accused of stealing maize from his employer, the day he left is the date the maize was stolen, he was not arrested with any maize, there was a security officer at the company, there is a wall which is 3 metres long, it is not possible to lift all that maize across the fence, there is a CCTV camera, he had a good relationship with the company until he joined the union, this is why the company had him arrested, he does not know anyone by the name Edward Ochieng, he also did not know Philip Kogo (PW3), on 3/11/2017 he was on night-shift.

13. DW2 was Josphat Achika Ojwang. He testified that he was the branch secretary of the employees Union in Eldoret, he was dealing with unfair termination of the Appellant, they wanted the Appellant to be paid his terminal dues, they had meetings with the company on 17/11/2017 and on 22/05/2018, the issue of theft was not discussed, he later received a call from the Appellant that he had been arrested on 14/06/2018, he wrote a protest letter, there was another meeting on 13/06/2018 in which the company came up with allegations that 4 bags of maize had been stolen, the Appellant had filed an employment claim in Court and that is when he was arrested.

14. DW3 was Philomon Kipchuba Kipkorir. He testified that although he is alleged to have stolen 82 bags of maize, he was told of only 4 bags, he was at work when he was arrested, the witnesses lied about the alleged theft, the witnesses could not have seen him as it was at night, the witness could not have seen him if the witness was 20 metres away, the police officer lied that DW3 had run away from work yet he was at work, the auditor did not sign the Report.

15. DW4 was Elisha Kiprono Korir. He testified that he is a security person at Ineet Millers, he lives with the co-accused, DW4 used to work up to 5 am, the co-accused used to work from 2 pm to 10 pm and would reach home around 10.08 pm, he could not therefore have been at the company at the time of the offence.

Judgment of the trial Court

16. Upon considering the testimony of the witnesses and the evidence produced, the trial magistrate on 27/08/2021 found both the Appellant and his co-accused guilty of the charge of stealing by servant and convicted them. On 21/09/2021 he sentenced each to serve Probation for 2 years.

Appeal

17. Being dissatisfied with the conviction and sentence, the Appellant filed this Appeal on 5/10/2021. 12 grounds were cited as follows:

    i. That the learned magistrate erred in law and in fact in basing the reason for conviction on inconsistent and incredible evidence of recognition and/or identification without observing that the recognition and/or identification had a high probability of error owing to the time of the alleged offence and nature of the circumstances surrounding the events.

    ii. That the learned magistrate erred in failing to find that an identification parade ought to have been conducted under the circumstances.

    iii. That the learned magistrate erred in law and fact in failing to consider and find that in the absence of recognition or voice identification there was no corroboration of the prosecution of the prosecution evidence to justify a conviction of the Appellant.

    iv. That the learned magistrate erred in law in relying on evidence of an unqualified person who testified as an accountant.

    v. That the learned magistrate erred in disregarding the investigating officer's testimony that the maize which was allegedly stolen was later on recovered and that the Appellant was not in any way involved and/or was not in possession of the said maize.

    vi. That the learned magistrate erred in law in failing to consider that the prosecution evidence was insufficient to sustain the conviction.

    vii. That the learned magistrate erred in fact and law in convicting and sentencing the Appellant without determining whether the charge was properly investigated.

    viii. That the learned magistrate erred in failing to find that the evidence of the investigating officer was crucial under the circumstances without which prosecution's case lacked merit and ought to have failed.

    ix. That the learned judges erred in law in failing to find that the goods allegedly stolen were not produced in Court as evidence thereby making it impossible to sustain the charge of stealing by servant.

    x. That the learned magistrate erred in law in convicting the Appellant without considering the evidence tendered by the Appellant and/or his defence witnesses.

    xi. That the learned magistrate erred in failing to regard the fact the Appellant was not afforded a fair trial.

    xii. That the analysis of the evidence on record by the trial magistrate in her judgment was improper, faulty and prejudicial to the Appellant.

Notice of Enhancement of Sentence

18. On 24/01/2023 the Respondent filed a Notice of Enhancement of Sentence

Hearing of the Appeal

19. The parties then filed written submissions. The Appellant's Submissions were filed on 22/03/2023 through Messrs Oyaro J Associates and the Respondent's Submissions were filed earlier on 25/01/2023 by Mwenda Jamlick Muriithi, Prosecution Counsel.

Appellant's Submissions

20. Counsel for the Appellant submitted that since the offence is alleged to have occurred at night, the issue of proper visual recognition and/or identification is crucial, the evidence of PW2 and PW3 who testified that they saw the Appellant was not convincing, the nature of the light from the security light and its intensity was not evaluated, no information was given on the intensity and brightness of the light, it was essential to ascertain what sort of light it was, its size and its position relative to the suspect, failure to mention and give a description of the appellant at the earliest opportunity reduced the weight of the identification testimony and that an identification parade ought to have been conducted. He cited the decisions in *Wamunga v R* (1998) KLR 424, *Republic v Turnbull* (1976) 3 ALL ER 549, *Nzarov v Republic* (1991) KAR 212, *Kiarie v Republic* (1984) KLR 739, *Maitanyi v Republic* (1986) KLR 198 and *Simiyu & Another* (2005) 1 KLR.

21. Counsel submitted further that the audit Report was inconclusive as to the date that the same was conducted, the person who conducted the audit had no capacity in law to conduct an audit as he admittedly is not a member of the Institute of Certified Public Accountants of Kenya, he was therefore not authorized to practice, he was not an independent auditor as he was working on complainant's instructions, the investigating officer testified that she relied on information from one Joseph Kiprono to arrest and charge the Appellant, the said Joseph Kiprono was neither a complainant nor a witness in the case, the officer testified that the bags of maize allegedly stolen were later recovered, they were not recovered in the possession of the accused, the bags were however not produced in Court as evidence, the number of bags stolen and the contents could not established from the testimonies of the witnesses, the testimony of the Appellant was not controverted, it is not denied that there was an employment dispute between the complainant and the Appellant, the case is an attempt by the complainant to use the Court to settle an existent employment dispute, the evidence tendered was hearsay, it was not direct evidence as no one saw the accused at the scene and that the Appellant was condemned as guilty since it took 8 months to arrest him.

Respondent's Submissions

22. On his part, Counsel for the State submitted that PW2 confirmed that he saw the Appellant throw the sacks containing the maize that was stolen over the fence, PW2 was just 10-15 metres away from the scene where he was hiding, there were lights and therefore he could see the Appellant clearly, he also knew the Appellant by his face. Counsel too cited the decision in *Wamunga versus Republic* (1989) KLR 424. He submitted further that PW2 could see the kind of clothes the perpetrators were wearing – Inet Millers uniform, identification parades are not conducted in respect of people who are recognized but in respect of strangers whom witnesses claim if given a chance they can be able to identify, PW3 testified that he saw the Appellant carrying luggage and was standing on a stone so that he could throw the luggage, there was too much light and he was about 20 metres from the scene, he could see the Appellant clearly, the evidence of PW3 corroborates that of PW2, the Appellant was well known to

PW3. He cited the decision in *Reuben Taabu Anjononi & 2 others v Republic* and further submitted that the prosecution case was proved beyond reasonable doubt.

23. On the notice of enhancement of the sentence of 2 years' probation, Counsel argued that the sentence was inappropriate and unjustified and ought to be enhanced to 7 years custodial sentence.

Analysis & Determination

24. This being a first appellate court, it has a duty as was stated in *Okeno v. Republic* [1972] EA 32 as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* (1975) EA 57). 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."

Issues for determination

25. It is evident that, in summary, the matters that have been raised by Counsel for the Appellant includes whether there was proper recognition and/or identification of the Appellant, whether an identification parade ought to have been conducted, whether the audit Report produced by the prosecution was admissible or reliable, whether the investigating officer conducted proper investigations, whether it was relevant that the alleged stolen bags of maize were not recovered in the possession of the accused, whether non-production of the recovered bags in evidence, the alleged failure to establish the contents of the bags and the alleged uncertainty over the number of bags stolen weakened the prosecution case, whether the criminal trial was being used by the complainants to settle an employment dispute and whether it is relevant that it took 8 months to arrest the Appellant.

26. On its part, apart from responding to the above matters, the State sought an enhancement of the sentence of 2 years' probation imposed on the Appellant to 7 years imprisonment.

27. Upon considering the above matters, together with the Petition of Appeal and the submissions filed herein, I find the following to be the issues that arise for determination in this Appeal;

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the sentence of 2 years' probation should be enhanced

28. I now proceed to analyze the Issues.

Whether the Prosecution Proved its Case Beyond Reasonable Doubt

29. The definition of stealing is provided in Section 268 of the *Penal Code*, Cap. 63 as follows:

> " A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

30. Section 281 of the *Penal Code*, then provides 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 imprisonment of seven years."

31. It is therefore clear that to secure a conviction on a charge of stealing by servant under Section 281 of the *Penal Code*, the prosecution must prove that stealing or fraudulent conversion occurred, that the stolen items belonged to the employer and that the offender is a clerk or servant.

32. On whether stealing or fraudulent conversion occurred, PW1, Kennedy Mutai testified that he is a director of Ineet Millers which grinds maize, on 3/11/2017 he was informed by his neighbour that there was theft going on in the factory, the neighbour lives behind the factory and he too was informed by his watchman, PW1 then positioned 2 people, Philip and Andrew who do not work in the factory to survey the happenings, on 3/11/2017 they told PW1 that indeed there was theft of maize that night, a worker was throwing maize on the other side of the factory and a motorbike was ferrying it away, PW1 then did stock-taking with his Accountant and found that 82 bags of maize were missing, the value of the lost bags of maize was about Kshs 188,600/- and his Manager then reported the theft at Central Police Station at Eldoret.

33. PW2, Anthony Kipkemoi stated that he and one Kipkemboi Kogo while outside at around 2.30 am saw a motor cycle with 2 people being parked, 2 people were throwing luggage from inside the fence, others were receiving it from the other side and putting it on the motorcycle and the luggage was parked in sacks.

34. PW3, Philip Kogo testified that in October and November 2017 he used to take animal feeds to the company, a friend called by the name Kirigo told him that something was going on at the factory, the owner asked him to survey, he therefore went to sleep at one Kirigo's house who lives behind the factory so that he could investigate, in the middle of the night he heard the sound of a motor bike, he went outside to check and saw the Appellant carrying luggage, the Appellant had to stand on a stone so that he could throw luggage, they were 2 people but he only recognized the Appellant, it was around 2 am but there was sufficient light, he was about 20 metres away, he called the owner of the factory and the following day he reported the incident to the police.

35. PW4, Evans Onyango Odungo stated that he is an Accountant, he did stock-taking at Ineet Milers for the period 1st - 31st October 2017, at the beginning the bags were 933 but at the time of closing stock it was 851 bags, thus a deficit of 82 bags.

36. PW5, Police Officer Esther Mbidi stated that a Report was made on 15/09/2017 by Inet Millers that on the midnight of 3/11/2017 the director of the company received a call about a theft in his company. She also stated that the stolen bags of maize were recovered but not in the possession of the accused persons.

37. Although there are some slight contradictions on dates and time of occurrence of events from the above witness testimonies, I find the same to be minimal and unlikely to have been intended. While in some instances the witnesses are recorded to have referred to year of the incidents as 2018 and in some instances as 2021, it is clear that they meant 2017. Considered generally, I am satisfied that the above witness accounts proved that indeed the theft occurred, the stolen bags contained the complainant's maize and that the amount of bags of maize stolen was estimated at 82 bags.

38. Counsel for the Appellant submitted that the audit Report produced by the prosecution was inconclusive as to the date the same was conducted, the person who conducted the audit had no capacity in law to conduct an audit as he is not a member of the Institute of Certified Public Accountants of Kenya (ICPAK), he was not an independent auditor as he was working on instructions of the complainant, although the bags of maize allegedly stolen were later recovered, they were never produced in Court as evidence, the number of bags stolen and the contents was not established.

39. First, I note that the Report produced is not technically speaking an Audit Report but is simply a Stock-taking Report. The same merely shows the number of bags purchased by the complainant's company Ineet Millers during the month of October 2007, the actual number of bags in the store, unit cost per bag and the total cost. In summary, the Report simply shows that the number of bags of maize purchased over that period was 933 bags each at a cost of Kshs 2,300/- and thus totalling the aggregate purchase price of Kshs 2,145,900/-. The Report also shows that at the time of counting, the actual number of bags available in the store was only 851 bags thus there was a deficit of 82 bags which could not be accounted for and whose value was Kshs 188,600/-.

40. Counsel for the Appellant has not produced any authority to show that one cannot prepare such stock taking Report unless he is a member of ICPAK. Even if that were the case, I would still hold that such requirement alone would not by itself bar PW5 as the person who carried out the stock-taking from testifying on what he found. In any case, the contents of the Report were not controverted and more importantly, the production of the Report by PW4 as exhibit or his eligibility to testify were never challenged or objected to at the trial.

41. Counsel has also submitted that although the bags of maize allegedly stolen were later recovered, they were never produced in Court as evidence. My understanding of the evidence of PW5 (investigating officer) is that although the stolen bags of maize were recovered, they were not recovered in the possession of the accused persons. In the circumstances, I do not deem the non-production of the recovered bags as exhibits as being crucial to the prosecution case.

42. I am therefore satisfied that the first two ingredients of the charge of stealing by servant under Section 281 of the Penal Code, namely, that stealing or fraudulent conversion occurred and that the stolen items belonged to the employer or came into the possession of the offender on account of his employer have been proved. What is now remaining is the third ingredient, namely, whether the Appellant was positively identified as the offender and in turn, whether he was a clerk or servant.

43. On this issue of identification, PW1, Kennedy Mutai testified that upon receiving reports of theft at his company, he stationed people to carry out surveillance, he got 2 people (Philip and Andrew) who do not work in the factory to do so, on 3/11/2018 they told PW1 that there was theft of maize that night, a worker was throwing maize on the other side of the factory and a motorbike was ferrying it, his Manager then report the matter to Police, the police investigated and the Appellant was identified as one of the perpetrators, he was on shift on that day, PW1 has not had a misunderstanding with the accused persons before.

44. PW2, Anthony Kipkemoi stated that on 7/10/2018 he and one Kipkemboi Kogo while outside at around 2.30 am saw a motor cycle with 2 people being parked, 2 people were throwing luggage from inside the fence, others were receiving it from the other side and putting it on the motorcycle, the luggage was parked in sacks, there are security lights, he saw the person who was throwing it and also the person who was on the motorbike, they were wearing Ineet Millers uniform, he knew them by their faces, the Appellant was the one who was throwing and the other was outside. In cross-examination, he stated that they were hiding behind a church, about 10-15 metres away, there are lights, the number plate of the motorbike was hidden, they identified the accused persons, he could not tell how many

they were, they were afraid to raise the alarm, the motorcycle was carrying 4 bags, he had seen the co-accused before at Ineet, he identified him but he did not however know his name. In Re-Examination, he insisted that the lights were very clear and he could therefore see the faces of the accused.

45. PW3, Philip Kogo testified that upon PW1's instructions, he went to sleep at the home of one Kirigo's home who lives behind the factory so that he could investigate, in the middle of the night he heard the sound of a motor bike, he went outside and saw the Appellant carrying luggage, the Appellant had to stand on a stone so that he could throw luggage, they were two people but he could recognize one, he knew the Appellant before the case, it was around 2 am, there was too much light, there is a church and a hospital around there, he was standing about 20 metres apart, he called the owner of the factory, the following day he went to the police.

46. PW5, Esther Mbidi., the investigating officer stated that a Report was made on 15/09/2017 by Inet Millers that on the midnight of 3/11/2017 the director of the company received a call about a theft from his informers whom he had earlier instructed, PW5 visited the scene, she found that 2 employees had deserted work, she recorded statements from witnesses who had identified the employees since they were adjacent to the company, she arrested the suspects and charged them.

47. Counsel for the Appellant has submitted that since the offence is alleged to have occurred at night, the issue of proper visual recognition and/or identification is crucial. There can be no dispute that this observation is correct and has been restated in many cases (see for instance *Abdalla Bin Wendo & Another v Republic* (1953) 20 EACA 166 and *Roria v Republic* (1967) E.A. 583).

48. Counsel then faulted the conviction for the reason that in his view, the evidence of PW2 and PW3 who testified that they saw the Appellant was not convincing and that the nature of the light from the security light and its intensity was not evaluated. He added that no information was given on the intensity and brightness of the light, it was essential to ascertain what sort of light it was, its size and its position relative to the suspect and that failure to mention and give a description of the appellant at the earliest opportunity reduced the weight of the identification testimony. He also submitted that an identification parade ought to have been conducted.

49. I have perused the proceedings of the trial Court and have to disagree with Counsel's submissions. PW2 and PW3 both stated that they identified the Appellant. PW3 stated that he already knew the Appellant even before the incident as a worker in the factory. This was therefore more of evidence of recognition. It has also not been denied that the Appellant was working on night shift on the material date and at the time that the incident is alleged to have occurred. The evidence therefore places him right at the scene of the crime. The evidence of the witnesses therefore sufficiently corroborated each other as regards the identification of the Appellant. There was also the evidence of PW4 (police officer) that the accused persons had deserted work after the incident.

50. Regarding the lighting, its intensity and brightness, PW2 and PW3's evidence taken together is that there was sufficient light around the area as there was a church and a hospital within the neighbourhood and whose lights illuminated the area sufficiently to enable them see the perpetrators and identify them, including describing the clothes that they were wearing and the role played by each accused person. The most important aspect of this evidence is that the suspects were already well known to the witnesses long before the incident. Further, according to the witnesses, the theft took place over a period of about 40-50 minutes and the motorcycle would, once full, carry the loot away then return for more. The witnesses therefore had ample opportunity to identify and recognize the perpetrators.

51. On the issue of an identification parade, I agree with State Counsel acting for the Respondent that such parades are conducted in respect of suspects whom witnesses saw but are unknown to the witnesses or

are not so well known to them (identification evidence). It is not expected to be conducted in relation to suspects who were already well known to the witnesses even before the incident (recognition evidence).

52. On this issue of identification, recognition and identification parade, I find the facts of this case to be on all fours with the facts in the Court of Appeal case of *Livingstone Muriuki Mwangi V Republic* [2009] eKLR in which the following holding was reached:

> " The evidence led by the prosecution and accepted by the trial court and we have no reasons to disagree with the findings of the learned magistrate on the issue was that during the robbery, the bar was well lit. The appellant did not discount this piece of evidence either in his cross-examination of the prosecution witnesses nor in his defence. There is evidence that on the same night of the robbery, PW7 visited the scene and established that the bar had enough light and one could easily identify the thugs. PW1 testified on the issues as follows: "..... The robbery took 20 minutes. The bar was well lit. The lights were on. I was able to identify one of the robbers ..... I know him physically. I can identify him from anywhere ..... The man who robbed me was black in complexion and medium in height. He was not overweight ....." As for PW3, she testified on the issue as follows: "..... The lights were on ..... The robbery took 2 hours. I was able to identify one of the robbers since I usually see him in town. I do not know the name but I know him physically. He was the one who was armed with a gun ....." From the foregoing testimony there is no denying that the bar was well lit during the robbery. Much as the type of light available does not come through the evidence, i.e. whether it was electricity light, lantern light e.t.c., it is safe to assume that the bar was well lit with the type of light that was available. The evidence that the bar was well lit was after all not challenged at all. Much as it may have been necessary for the prosecution to establish the nature and source of light available as well as the source of light in relation to the appellant, we are nonetheless satisfied on the uncontroverted evidence of PW1, PW3 and PW7 that the bar was well lit and it was not difficult on the part of these two witnesses (PW1 & 3) to observe the appellant sufficiently as to be able to recognise him. After all there was no evidence that the appellant had in any way disguised himself as to make his identification difficult. The light remained on throughout the incident which took over 20 minutes according to PW1 but 2 hours according to PW3. This discrepancy as to the period the robbery took place is immaterial. What is important is that the robbery was not committed in a split second. The robbers took their time in committing the robbery thereby exposing themselves to easy recognition. More so in a situation such as the one obtaining herein where the two witnesses were familiar with the appellant, their recognition could not have been difficult. The said witnesses were not exposed to harrowing experience as would have interfered with their perception and recognition of the appellant.
>
> This is therefore, not a case of identification perse but recognition as well in which PW1 and PW3 gave details of the circumstances under which they were able to recognise the appellant. They even described what role the appellant was playing in the whole act. Immediately after the commission of the offence, these two witnesses were able to give the description of the appellant to the police. That description fitted well with the appellant who was being looked for by the police as a result of his involvement in a spade of robberies.
>
> In the case of *Anjononi & Others v Republic* (1980) KLR 59, the court of appeal said:
>
> > "..... The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in cases like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was,

> however, a case of recognition, not identification, of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other ...."

We respectfully agree with the foregoing which in our view, applies to the facts in this appeal. We have anxiously considered the issue of identification and or recognition of the appellant and it is our view that the trial court below cannot be faulted in the manner it dealt with the issue. However, what has caused us anxiety is the question of the appellant's photographs as a most wanted criminal being pasted on the notice board within the police station and being circulated within Murang'a town and its environs. It may very well be possible that the identifying witnesses aforesaid may have seen the photographs. However, this is neither here or there and does not advance the appellant's case any further. In fact, there was no need for the identification parade to be conducted in respect of the appellant since the two witnesses had recognised him during the robbery. So that the identification parade was really not necessary. Secondly, following their recognition of the appellant they gave his description to the police immediately after the robbery. This was long before the appellant's photographs were circulated by the police. The witnesses knew the appellant before then. So that whichever way one looks at it, the circulation of the appellant's photographs did not at all occasion any prejudice to the appellant."

53. I also refer to the decision of Kiarie Waweru Kiarie J in *Republic v Valentine Maloba & 2 others* [2021] eKLR, in which he held as follows:

> " 8. The third issue is on the identification parade. Identification parades are not conducted in respect of people who are recognized but in respect of strangers, whom witnesses claim that given a chance, they can be able to identify the perpetrator. Since he claimed to have known the first accused, one wonders the value of the identification parade."

54. On whether the Appellant was a servant within the meaning of Section 281 of the *Penal Code*, it has not been denied that he was at the time of the incident in employment of the complainant's company in the packaging section. His employment contract and payroll were produced in evidence and were never challenged.

55. Having found that the Appellant was positively identified as the offender, I am therefore also satisfied that the third ingredient of the charge of stealing by servant, namely, that the Appellant was "a clerk or servant" within the meaning of Section 281 aforesaid was also sufficiently proved.

56. On whether the criminal trial was being used by the complainants to settle an employment dispute, I find that the answer is in the negative. This is because the employment dispute arose subsequent to and only as a direct result of the theft incident, not prior. Although the Appellant also claimed that he was being victimized by the complainant because he joined the worker's union, this was alleged as a mere allegation without any evidence.

57. On the submission that the arrest and prosecution of the Appellant was irregular because he was arrested 8 months after the incident, an answer was provided that the investigations were still ongoing and that the Appellant was only arrested upon completion of such investigations. In the absence of any controverting evidence, I am satisfied that this was a plausible and acceptable explanation.

58. The upshot of the above is that I am satisfied that the trial Magistrate did not err in reaching the finding that the prosecution proved its case beyond reasonable doubt. The conviction was therefore merited.

Whether the Sentence of 2 Years' Probation should be enhanced

59. Counsel for the State argued that the sentence of 2 years' probation was inappropriate and unjustified and ought to be enhanced to 7 years custodial sentence. In other words, he is of the opinion that the sentence is too lenient.

60. As already stated above, under Section 281 of the *Penal Code*, a charge of stealing by servant attracts a custodial sentence of up to 7 years imprisonment. Further, the value of the bags of maize lost as a result of the theft was estimated at Kshs 188,600/-. Viewed from these points of view, I agree that the sentence of probation appears to have been quite lenient and a "slap on the wrist" for the Appellant. I am however alive to the principle that sentencing is basically an exercise to be left to be carried out by the trial Court. This has been reiterated in various cases including Bernard Kimani Gacheru v Republic [2002] eKLR where the Court of Appeal stated as follows:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

61. Apart from only the supposed leniency of the sentence, it has not been sufficiently demonstrated to this Court that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Again, as stated by the Court of Appeal above, even if this Court feels that the sentence is lenient and that this Court might itself have passed an enhanced sentence, that alone is not a sufficient ground for interfering with the discretion of the trial court on sentence.

62. I also cite the Court of Appeal decision in *Joseph Muerithi Kanyita v Republic* [2017] eKLR where the Court stated made a finding in the following terms:

> " In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant."

63. In the circumstances, and although I share the opinion that the sentence of 2 years' probation appears, in my view, to have been quite lenient, I nevertheless decline the invitation to enhance the sentence to a custodial sentence.

Final Orders

64. Consequently, I issue the following orders:

    i. The Appeal is found to lack merits and the conviction of the Appellant by the trial Court is upheld. Accordingly, the Appeal is dismissed.

    ii. The Notice of enhancement of sentence is similarly declined.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

.....

WANANDA J.R. ANURO

JUDGE