



**Njeru v Republic (Criminal Appeal E025 of 2024)
[2024] KEHC 14416 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E025 OF 2024
LM NJUGUNA, J
NOVEMBER 20, 2024**

BETWEEN

JOSEPH KARIUKI NJERU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. J. Otieno (SRM) in
Embu MCCR No. 768 of 2019 delivered on 23rd January 2024)*

JUDGMENT

1. The appellant filed a petition of appeal dated 28th February 2024 seeking for orders that:
 - a. The appeal be allowed; and
 - b. The punishment of compensation be set aside or the sentence of 3 years imprisonment be substituted with a non-custodial sentence.
2. The appeal is premised on the grounds that:
 - a. The learned trial magistrate erred in law and fact by imposing a sentence of imprisonment without considering that the appellant started experiencing the consequences of crime from the time he was arrested;
 - b. The learned trial magistrate erred in law and fact by ordering that the appellant pays compensation without considering that the appellant will be in prison, not being able to earn an income; and
 - c. The learned trial magistrate erred in law and fact by imposing a sentence of 3 years imprisonment and compensation which led to unfair trial in contravention of Article 50(2) of [the Constitution](#).



- d. The learned trial magistrate erred in both points of laws and facts by imposing a punishment of a sentence and compensation upon the appellant causing the appellant to suffer double jeopardy.
3. The appellant was charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The particulars of the offence are that on diverse dates between 03rd March 2018 to 31st July 2019, at Peko service station in Karurumo village in Embu East sub county within Embu County, the appellant stole Kshs.2,916,225/=, the property of Peko Service Station Limited which came into his possession by virtue of his employment.
 4. The appellant pleaded not guilty and a plea of not guilty was entered for each count. The matter proceeded to full hearing.
 5. PW1 was Dennis Karani Njiru, a director of Peko Service Station Limited who stated that the appellant was an employee of the company from March 2017. He stated that on 12th June 2019, the appellant was unwell and so he relieved him to go to hospital. That when he was looking through the records, he noticed some anomalies and he decided to conduct an audit. That in August of that year, he went to pay salaries and he found that the appellant had taken Kshs.54,000/= from the business, which money he returned.
 6. That the audit which was done by Mwaura Waithaka & Associates, revealed a deficit of Kshs.2,916,225/=. That he tried to contact the family of the appellant about the issue but they became evasive and that is when he reported the matter to Embu Police Station. He produced documentary evidence showing that the appellant was an employee of the company and the audit report. He stated that the appellant was a supervisor at the company and he was earning Kshs.12,100/= per month.
 7. On cross-examination, he stated that the appellant was the supervisor of Karurumo petrol station and he had worked with his brother Sammy Ileri who had complained about the appellant's theft. That the records used for audit were in the custody of the appellant and the audit revealed that the money was lost between March 2018 and July 2019. That the appellant repaid the amount of Kshs.54,000/= which he had taken and he was suspended to make way for investigations.
 8. PW2 was Justus Mwaniki of Maina Waithaka & Associates who testified that he investigated the complaint by PW1 that he suspected the appellant was misappropriating company money. He stated that he found overstatements on some aspects of the account which did not tally with the bank accounts. That the audit report was limited to the documents provided by the company and it disclosed a deficit of Kshs.2,916,225/=. On cross-examination, he stated that the records were handwritten and they recorded the sales and expenses differently. That some figures for closing balances did not match the opening balances.
 9. PW3 was Brian Githinji Munene who stated that in March 2018, he was a pump attendant while the appellant was his supervisor for a period of 1 year. That he used to hand over all the payments to the supervisor after his shift and that they took pump readings before shift and after shift. That he heard that PW1 had nabbed the appellant for stealing money from the company. On cross-examination, he stated that the appellant was accused of stealing the money at the point of banking it. That after he handed over the money to the appellant, he did not follow up to know what the appellant did with it. That he was present when PW1 was checking the records and that it was the appellant's records that had discrepancies. That credit sales were only made with the appellant's approval.
 10. PW4, P.C Leah Nzioki formerly of DCI Embu West stated that the matter was reported by PW1 who produced documents to show that he was a director in the company and that the appellant was an



- employee therein. That the appellant was hired by PW1's late father and he rose to the position of a supervisor. That PW1 conducted an audit which revealed that the appellant was embezzling company money. That the appellant admitted to embezzling Kshs.1.8 million and they both agreed to try to reach an agreement but this did not work.
11. That the appellant later told them that he is ready to face the court process and so he was arraigned in court after an audit revealed that the missing money was Kshs.2.9 Million. On cross-examination, she stated that the appellant and complainant were trying to work out an out of court settlement but it did not materialize. That no agreement between the complainant and the appellant was written in her office because that is not permitted. That the appellant was charged after the audit report had been released.
 12. At the close of the prosecution's case, the court found that the appellant had a case to answer and he was placed on his defense.
 13. DW1 was the appellant who stated that he worked at Peko company from March 2017 and in March 2018, PW1 found a shortfall of Kshs.54,000/= which the appellant paid back. That he thought that the issue was over but PW1 later alleged that he had misappropriated Kshs.2,916,225/= and he was summoned to the DCI about him. That he went to PW1 to talk to him about it but he refused to hear it. He stated that he was not the only one handling records at the station and that he did all the work that others did but he was paid a bit more.
 14. That he was not the only one who was handling cash but also PW1's brother used to take money from the petrol station on instructions of his mother and he would say that he was going to buy fuel and he could not decline to give him the money. He stated that he did not understand how the company continued to run yet such a big amount of money had been stolen. On cross-examination, he stated that there was a safety box where the money for the business used to be kept. That he agreed to return the Kshs.54,000/= so that the matter wouldn't escalate. That after the death of PW1's father, Samuel visited to go over the records and an audit was done.
 15. The trial court considered the evidence and convicted the appellant. He was sentenced to pay a fine of Kshs.700,000/= in default, 3 years imprisonment. The court also directed the appellant to compensate the complainant the sum of Kshs.2,866,365/=.
 16. The appeal was canvassed by way of written submissions.
 17. The appellant submitted that the trial court did not consider that he would be incarcerated following the sentence and that in prison, he won't be earning any income. That he cannot afford the fine that was imposed, much less the money to compensate the complainant. That according to him, there was no record showing his signature on the documents that revealed the issues during the audit, and as far as he is concerned, there was a shortfall of Kshs.54,000/= which he repaid. He argued that the audit was conducted in his absence and that there were no receipts found that bore his signatures. He urged the court to review the sentence to a non-custodial one and set aside the order for compensation.
 18. The respondent relied on the case of Emmanuel Kombo Onteri v. Republic (2022) eKLR where the elements of the offence as set out in section 281 of the Penal Code were broken down. It referred to the evidence adduced and urged that the offence was proved against the appellant beyond reasonable doubt. It submitted that the sentence imposed by the trial court was lawful and should not be interfered with and it cited the case of Shadrack Kipchoge Kogo v. Republic, Eldoret Criminal Appeal No.253 of 2003. That section 31 of the Penal Code permits the sentencing court to also order compensation to the person injured by the offence, either in addition to or in substitution of the sentence. That this is in line with section 175 of the Criminal procedure Code and the compensation should be in line with



what the complainant could have recovered from civil courts. It relied on the case of Francis Gachugu Njuguna v. Republic (2021) eKLR and urged the court to dismiss the appeal.

19. The issue for determination is whether the sentence imposed by the trial court should be reviewed in light of the compensation order.
20. Having been convicted of the offence he was charged with, the trial court imposed a sentence of a fine of Kshs.700,000/= in default, 3 years imprisonment and compensation of Kshs.2,866,365/=. The appellant in this appeal has taken issue with the fact that he has been sentenced to pay a fine which he cannot afford and in default, to a custodial sentence while he has a sick mother and disabled child who depend on him. He has also decried the fact that the trial court has ordered him to compensate the complainant a sum that he cannot afford yet from the sentence itself, it seems like he will be held in custody because he cannot afford the fine.
21. The trial magistrate cannot be held to have erred in making an order for compensation because this is anchored on Section 31 of the Penal Code which provides:

“ Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.”
22. This provision is usually read together with section 175 of the Criminal Procedure Code which provides for compensation in a criminal case. In the case of Murungi & another v. Republic [2022] KEHC 18126 (KLR), the court stated thus:

“ The court has discretion to order compensation in addition to the punishment imposed or may be ordered as a substitution for any other punishment. It was therefore proper for the trial magistrate to order the appellant to pay compensation. Section 31 of the Penal Code must be read together with Section 175 (2) (b) of the Criminal Procedure Code which also deals with the question of compensation in criminal proceedings. It is this court’s finding that Section 175 (2) operationalizes Section 31 of the Penal Code and provides the legal principles which should guide trial courts in exercising their discretion while deciding whether or not to order payment of compensation by a convict, in addition to any other punishment.”
23. According to the Judiciary Sentencing Policy Guidelines 2023, paragraph 2.6.13 states:

“ The fact that a custodial sentence is imposed does not, in itself, make it inappropriate to order compensation but the court should enquire whether the offender will have the means to satisfy the order if imprisoned. It may be more appropriate to advise the injured party to seek a civil suit. Where a compensation order is imposed alongside a custodial sentence, imprisonment in default of non-payment should not be imposed.”
24. In the present case, the trial court ordered a custodial sentence in default of a fine, alongside compensation bearing in mind the victim’s wishes and his demand for justice. According to section 175 of the Criminal Procedure Code, where the compensation should be ordered it must be for an amount that the complainant can recover through civil proceedings. However, if the substance of the arguments is complex and would demand a hearing on quantum, the complainant should pursue compensation before a civil court.



- 25. From the evidence adduced on how the appellant stole the money in the course of his employment, it is my view that there is a level of complexity to the matter, that would be better off determined on quantum generally before a civil court.
- 26. Therefore, it is my considered view that the complainant should institute civil proceedings against the appellant for recovery of his money. The civil court will determine quantum and award the appropriate damages as compensation.
- 27. In the end, having considered the relevant laws and submissions by the parties in this appeal, I find that the appeal partially succeeds with orders thus:
 - a. The trial court’s finding on conviction is hereby upheld;
 - b. The sentence imposed by the trial court to wit, a fine of Kshs.700,000/= in default 3 years imprisonment, is hereby upheld; and
 - c. The trial court’s order for compensation of Kshs.2,866,365/= is hereby set aside.
- 28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA
JUDGE

..... for the Appellant
.....for the Respondent

