



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO 31'B' OF 2018

MADRINE GATWIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Senior Resident Magistrate HON. M. SUDI at Chuka Law Courts, Chief Magistrate's Court Criminal Case No. 841 of 2013 dated 26th November, 2018.)

J U D G E M E N T

1. **MADRINE GATWIRI**, the Appellant herein was charged with the offence of Stealing by Servant Contrary to **Section 281** of the **Penal Code** vide **Chuka Chief Magistrate's Court Criminal Case No. 841 of 2013**. The particulars of the charge presented to that court are that on diverse dates between 8th June 2011 and 3rd June 2013 at Discount Farmers Stores and Agrovet at Chogoria Township within Tharaka Nithi County being a servant to **LEONARD NJERU NGAINE** (complainant) stole **Kshs.2,513,215/-**, the property of the said **LEONARD NJERU NGAINE** which came into her possession by virtue of her employment. The Appellant denied committing the offence but upon full trial she was found guilty and was convicted and sentenced to serve 4 years imprisonment. This appeal is against both that conviction and sentence.

2. (a) **Background:**

The evidence tendered at the trial court in brief indicates that the Appellant was employed as a shop sales assistant or attendant on 21st September 2010 at an agreed salary of Kshs.5000/- per month. She was required to assist the complainant's wife run the business. The complainant (PW1) told the trial court that some time June 2011 his wife was taken ill and referred to Kenyatta Hospital for treatment and this forced the complainant who was running a similar business within Chuka Town to be delivering stock to the complainant who would receive the goods by making entries in a stock card. She was required to enter the goods sold on the cash sale receipt but after sometime the complainant realized after stock taking that there were discrepancies between what was entered in the stock card and what ended up in cash sale receipts. The complainant later engaged an auditor, Dawson Nyaga (PW2) who told the trial court that he carried out forensic audit for the period June 2011 to May 2013 and found malpractices which led to loss of funds totalling to **Kshs.2,513,215/-**. He tendered evidence showing that the cash sale receipts was less than amount in stock cards. This indicated that goods were being sold by the Appellant from the shop but the amounts realized were not being reflected on cash sale receipts or amount banked in the account. The witness told the trial court that the Appellant disappeared when she realized that an auditor had been called to carry out forensic audit.

3. The evidence of the investigating officer Too Kibet Aggrey (PW4) gavemore weight to the prosecution's case. He tendered evidence revealing various stocks as per the stock card but the same appeared missing in cash sale receipts. The investigating officer further added that he obtained bank statements on Appellant's accounts at Appellant's account at Equity Bank,KCB and Mpesa which revealed that within the material period, the deposits on her stated accounts increased a lot and the Appellant when queried about the source of the funds failed to give a satisfactory explanation.

4. When placed on her defence, the Appellant denied the offence but conceded that she was indeed employed as a shop attendant from 2011 and that part of her duties entailed banking the money realized from the sales of goods in the Agrovet shop.

In her defence regarding the discrepancies between the goods reflected on the stock card and cash sale receipts, the Appellant told the trial court that the complainant instructed her to manipulate the goods on the stock cards so his wife could not discover. She further conceded that she used to take money from the shop "**to do my own stuff**" and that she never used to write anywhere that she had taken the money. She further could not explain the source of money deposits in her account. She also told the trial court that there were times she would pay cash directly to the complainant but that he later turned against her which made her to disappear for three days.

5. The trial court upon evaluation of evidence found that the Appellant had committed the offence as the evidence tendered showed that

there was manipulation of account in order to cipher records to facilitate theft in the place of her employment. The trial court further found that she was employed and the money realized from sales came into her possession by virtue of her employment and disputed her allegations that she was a lover to the complainant and/or was given the latitude to use the money as she pleased. The Appellant on that basis was found guilty, convicted and sentence to serve 4 years imprisonment.

(b) **The Appeal:**

The Appellant felt aggrieved and preferred this appeal raising the following grounds namely:-

i. That the learned trial magistrate erred in law and fact by convicting the Appellant for an offence that was not proved beyond reasonable doubt and that the judgment delivered was not supported by law and fact.

ii. That the learned trial magistrate erred by failing to find that there was no servant relation between the Appellant and the complainant and therefore the offence of stealing by servant could not be sustained.

iii. That the learned trial magistrate erred in law and in fact by failing to consider and take into account the evidence of the Appellant.

iv. That the learned trial magistrate convicted the Appellant on insufficient and uncorroborated evidence.

v. That the conviction of the Appellant was based on a defective charge sheet.

6. In her written submissions, the Appellant has faulted the charge sheet upon which she was convicted pointing out that the amount in the charge sheet indicates that the amount stolen was Kshs.2,513,215/- while the evidence tendered indicated the amount stolen was Kshs.2,814,821/-. She has further pointed out that the trial court noted that the charge sheet did not indicate whether what was stolen was in form of cash or goods. She further contends that the prosecution was not able to prove exactly how much was stolen.

7. The Appellant further submits that the trial court relied on an incomplete audit report to convict the Appellant. She contends that the auditor in his report failed to factor in the expenses and the remaining stock in the shop therefore making the audit incomplete.

8. It is further contended that the investigating officer could not tell if it was the goods or the cash that had been stolen and that he only stated that the amount of goods and money did not tally. She has cited case of Willy Kosgei -vs- Republic [2014] eKLR where she claims that the court held that where contradictions and inconsistencies in a criminal case appear fundamental, doubts occur and the benefit of such doubts should always go to the accused person. In her view the trial court indicated that, the evidence was not very clear that that statement suggests that the trial court convicted the Appellant on mere suspicions and speculations.

9. She further contends that the Judgment delivered by the trial court was at variance with the evidence tendered and that the trial court filled the gaps left out by the prosecution which was improper as in her view she ought to have been an independent arbiter. She avers that the prosecution failed in its duty to prove its case against her and that she ought to have been acquitted as per the decision in Timothy Muthama Nzioki -vs- Republic [2019] eKLR.

10. The Appellant also contends that the prosecution failed to establish that a master servant relationship existed between the complainant and the Appellant because no contract of employment was tendered or record of wages despite the claim that she was being paid Kshs.5,000/- per month.

11. It is her contention that she was in a relationship with the complainant and that she was allowed to operate his shops without any salary for the 2 years she worked for him. The Appellant faults the trial court for disregarding this evidence.

12. The Appellant points out that no single witness saw her commit the offence and that evidence against her were not corroborated. She contends that the auditor did not consider expenses in the shop and only relied on stock card and sales book to make adverse report against her. In her view that audit report was incomplete and it was wrong for trial court to rely on it.

13. In response, the Respondent in its written submissions contends that the prosecution's witnesses were candid and clear. The Respondent points out that the complainant (PW1) testified that he runs an Agrovet shop where he had employed the Appellant as a shop attendant in 2010 and that between 4th June, 2011 and 3rd June 2013 his wife was unwell and he left the shop's day to day running in the hands of the Appellant and would go once in a while to supply stock and leave. The State further contends that when the complainant embarked on stock taking and audit, the appellant took off and that is when he noted discrepancies which were confirmed by the auditor who he engaged to check and confirm the malpractices. The malpractices in its view were noted which led to loss of funds and when investigations on the Appellant's personal accounts were carried out, they revealed large amounts of cash deposits which the Appellant could not explain or account for.

14. The Respondent has averred that the contract of employment in regard to the appellant was verbal and that **Section 8 of the Employment Act** recognizes such employment. It is further pointed out that the Appellant herself in defence conceded to that employment and that she was employed on a salary of Kshs.5000/- .

15. The Respondent has also averred that the Appellant's defence was considered by the trial court and found wanting as she could not explain the monies in her bank accounts and Mpesa,

16. The Respondent contends that the charge sheet was not defective for failing to indicate whether the theft was in relation to cash or goods. The State further contends that the Appellant clearly understood the nature of offence facing her and was able to defend herself.

17. This court has considered this appeal and the response by the State through the Office of Director of the Public Prosecution. The Appellant was charged and convicted of stealing by Servant Contrary to **Section 281** of the **Penal Code**. The provision 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 to imprisonment for 7 years."

18. The Appellant in this appeal has contended that the fact of employment or the employer-servant relationship was not established by the prosecution in the first place. But I have considered the evidence tendered by the prosecution in regard to this issue of employment and what the Appellant told the trial court herself during her defence. This is what she stated in her part in her evidence in chief:-

" I know the complainant since 2011 when he employed me at the shop Agrovet Discount Farmers Store. I was selling items..... I was not paid my salary after the 1st month. I followed him to ask for the salary before the end of month. He gave me Kshs.5000/-. He said money was not a problem".

In cross examination she was even more candid;

" I was employed by the complainant. I was given Kshs.5000/- the first month. It was not salary. We did not agree on the salary. I was the shop attendant even when the wife was present."

The above admission coupled with the evidence of the complainant in my considered view, established and proved beyond doubt that the Appellant was employed by the complainant notwithstanding the absence of a contract of employment. The contention by the Appellant that the prosecution did not prove that she was an employee in my view is totally unfounded.

19. On the question of defective charge sheet, though the Appellant claims that the amount on the charge sheet is not in tandem with the evidence tendered in court, I have checked at the record of proceedings and noted the particulars on the charge sheet were amended on 12th November 2018 to reflect that the amount stolen was **Kshs.2,814,821/-**. The Appellant was called upon to plead to the amended charge and she pleaded not guilty. I therefore find it surprising that the Appellant has turned around in this appeal and stated that the amount reflected in the charge sheet was **Kshs.2,513,215/-** which was the amount in original charge sheet.

20. The Appellant has contended that the prosecution's case was not proved and that there were doubts regarding the audit report which in her view was incomplete. I have gone through the evidence tendered by the prosecution and contrary to what the Appellant contends the evidence tendered against her was overwhelming. The complainant told the trial court of what aroused his suspicion, which was the fact that the amount reflected on sales receipts were less than the stocks delivered and sold as per the stock card. When the accountant, Festus Miriti (PW2) and the auditor (Dawson Nyaga- PW3) when through the records they both noted that funds were missing as some of the goods sold were not accounted for. It is apparent that when investigations were carried out by the investigating officer Too Kibet Aggrey (PW4), he noted that the Appellant's bank accounts held at Equity, KCB and Mpesa had deposits which though did not amount to the amount stolen were still large and the Appellant could not explain the source. The Appellant herself during cross- examination when asked to explain the source of a deposit of the Kshs.100,000/- in her KCB and Mpesa account on a single day stated:

" I cannot explain the source."

I further find that she really indicted herself in her defence when she stated;

" I used to take money from the shop to do my own stuff (sic). I never used to write anywhere."

Now when an employer takes what comes into her/his possession by virtue of her employment and unlawfully keeps it or converts it for her/his own use, he/she commits an offence of stealing as defined under **Section 268** of the **Penal Code**. The definition is given as follows:-

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

21. There is absolutely no doubt that the Appellant planned and executed her plans to steal from her employer. Her excuse that she was told to manipulate the records to facilitate the theft by the complainant in my view is absurd and simply incredible. Why would the same person complain, if it is true that he acquiesced to the manipulation of records at the shop to facilitate theft? In my considered view the issue of existence of a relationship was an afterthought brought up by the Appellant to justify her crime. The evidence tendered by the prosecution witnesses in my considered view proved beyond doubt that the Appellant had stolen the money that went to her by virtue of employment as a shop attendant. She herself stated that she was not in any other employment or other job to explain the source of the funds in her accounts. She further conceded that she played around the stock card and cash sales receipts and kept or took money from the shop for her own use without recording or accounting for the same. The judgment from the trial court was clearly supported by the evidence tendered by the prosecution and the Appellant who clearly gave self incriminating evidence on her own volition and when duly represented by counsel. I therefore find her assertions that the prosecution's evidence was not corroborated quite unconvincing and unfounded. Her own testimony in defence corroborated the prosecution's case and it is misleading for her to advance the view that the trial court filled the gaps left behind by the prosecution. If anything it is her own evidence that showed beyond doubt that she had committed the offence.

22. The Appellant alleges that the trial court did not consider her defence but it is clear that her evidence or defence was considered. The trial court noted that the Appellant confirmed the duties she had at the shop thus proving the servant-employer relationship and she confirmed she used money from the shop for personal use thus proving misappropriation of funds. She indicated that some of the money deposited in her account at Equity Bank was from milk proceeds for mother but she did not call her mother to testify and confirm the allegations. She further alleges that the audit report is incomplete for failing to take into account expenses but she did not present any accounts contesting that the amount or that the amount missing was used for expenses and the nature of those expenses in her defence. As I have observed above she largely indicated herself in her defence by admitting that she took money from the shop for her own use and without permission or records showing how much she had taken. She herself also indicated that she could not explain the source of large amounts deposited in her bank and Mpesa accounts.

23. This court finds that the evidence tendered by the prosecution was clear though the trial court may have in obiter termed the evidence "*not very clear*" in her judgment. The comment in my view did not change or alter the weight of the evidence tendered by prosecution which I have re-evaluated and found them sufficient to sustain a conviction for the offence charged.

24. On sentence, the Appellant has not raised any issue and I find non to interfere with it. In the end I find no merit in this appeal. The same is disallowed. Both the conviction and sentence are upheld.

Dated, signed and delivered at Chuka this 19th day of September, 2019.

R. K. LIMO

JUDGE

19/9/2019

Judgment signed, dated and delivered in the open court in present of the appellant and her counsel, Kaaria and in the presence of Momanyi for State/Respondent

R.K. LIMO

JUDGE

19/9/2019