



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

HCCRA NO. 45 OF 2017

TECLA KWAMBOKA RAINI.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. Njoki Kahara – Resident Magistrate

delivered on the 26th day of July, 2017 in Keroka SRM CR No. 535 of 2016]

JUDGEMENT

The Appellant in this case was found guilty and convicted for stealing by servant contrary to Section 281 of the Penal Code.

The particulars of the charge were that on 9th May 2016 at Keroka Township in Masaba North Sub-county within Nyamira County being a servant to Andrew Makori she stole Kshs. 80,000/= the property of Andrew Makori which came into her possession by virtue of her employment.

She pleaded not guilty to the charges. After hearing the evidence by both sides the trial magistrate was convinced that she had committed the offence and sentenced her to three years imprisonment.

Being aggrieved she preferred this appeal that challenges the conviction as well as the sentence.

In her petition of appeal she avers that the charges were not proved beyond reasonable doubt; that the trial magistrate ignored the contradictions in the evidence of the prosecution witnesses, that there was no cogent accounting or financial evidence tendered to prove the charge beyond reasonable doubt and that the trial magistrate shifted the burden of proof to her. On the sentence she contended that it was excessive and cruel in the circumstances of the case.

The prosecution and the defence agreed to canvass the appeal by way of written submissions. However up till the time of writing this judgement the prosecution had not filed their submissions.

Those of Mr. Kisera, Advocate for the Appellant were received and have been considered fully alongside the evidence before the trial court. In considering the evidence, I have taken care to caution myself that I did not see or hear the witnesses give evidence and I have given benefit for that.

At the trial the complainant gave evidence that he had employed the accused at his M-pesa shop while he himself worked at Kisii University and Rongo University as a Lecturer. He testified that on 9th May 2016 he called the supervisor of one of his other business, a hardware shop, and sent him to withdraw Kshs. 100,000/=. When that supervisor (Pw2) went to the accused she said she had no money although afterwards they went to Sotik and gave him Kshs. 67,000/=. It was then that he decided to find out what was happening at the M-pesa shop and when he audited the business, he found out that the accused used to siphon money from the business and send it to her kin. She would also bet with some of it. He stated that in total Kshs. 146,807/= was missing but what they confirmed from the M-pesa statement as stolen was Kshs. 80,000/=. He reported the matter to Keroka Police Station and the accused was arrested. Daniel Toya Etole (Pw3) a Police Constable at Keroka Police Station investigated the matter and in the course of the investigations obtained an M-pesa statement which together with the M-pesa transaction daily sheet he produced in evidence.

In her defence, the accused admitted that she worked in the hardware but denied that she had stolen the money. She contended that the hardware used to withdraw money from the M-pesa shop.

The M-pesa statement contains about twenty four entries which show that the accused either withdrew money or sent money to her relatives without having deposited money in the M-pesa account first. This is stealing because it means you are withdrawing money which does not belong to you. It amounts to converting someone's money without their consent because the complainant clearly did not consent. Had he done so then this matter would not have landed the accused in Court. I am not persuaded that the burden of proof was shifted to her. The prosecution had established a water tight case against her and when she was put on her defence one would have expected an explanation from her being the person who single handedly managed the business. The transactions were facts within her special knowledge. That is not shifting the burden of proof.

Mr. Kisera, Advocate faulted the production of the M-pesa statement by the Investigating Officer and submitted that it ought to have been produced by the maker. I do not agree with him. This was a statement issued to the complainant by Safaricom in connection to his statement and either he or the Investigating Officer could produce it. I am satisfied that from the evidence that the charge against the accused person, now the appellant, was proved beyond reasonable doubt. I shall not therefore disturb the conviction.

I am however persuaded that the sentence of three years imprisonment was excessive. This is considering the fact that the appellant was a first offender. Whereas she may have exhibited an unrepentant attitude at the trial, she has now been in jail for one year and that has taught her a lesson. I find that she can serve the rest of the term through a non-custodial sentence.

Accordingly the file is referred to the Probation Department for a report. Mention on 26th July 2018 for sentencing.

Dated and Delivered at Nyamira this 19th day of July, 2018.

E. N. MAINA

JUDGE

19/07/2018