



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIVASHA**  
**HCCRA NO. 104 OF 2015**  
**(FORMERLY NAKURU CRIMINAL APPEAL NO. 189 OF 14)**

**(Being an appeal against Conviction and sentence in  
Narok Criminal Case No. 1604/2013- Z. ABDUL RM )**

**ANN DAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was tried and convicted for the offence of Stealing by Servant contrary to section 281 of the Penal Code. The particulars stated that on diverse dates between 15<sup>th</sup> October and 5<sup>th</sup> November, 2013 at Narok township, Narok North District within Narok county, being a servant to **HALIMA ABDI** stole two laptops make ASUS and THINKPAD valued at Ksh.60,000/=, one computer desktop make LENOVO valued at Ksh.45,000/= one micro wave valued at Ksh.15,000/=, two sets of golden chain valued at Ksh.75,000/= and a ring valued at Ksh.8,000/= all valued at Ksh.203,000/= which came to her possession by virtue of her employment. She was sentenced to serve 4 years imprisonment.

2. In her Petition of appeal against conviction and sentence, the Appellant raises 10 grounds. Some of the grounds, such as grounds 1 & 9 are not really grounds of appeal. Grounds 2,3,4 and 5 attack the sentence as being excessive. Grounds 5 & 6 attack the prosecution evidence while in ground 7 the Appellant complains that her defence was not considered.

3. The first appellate court is obligated to consider the evidence of the trial afresh and to draw its own conclusions. While so doing, regard must be had of the fact that the trial court had the advantage of hearing and seeing the witnesses testify. Thus the Appellate court will not interfere with findings of the trial court that are based on the credibility of witnesses, unless those findings are plainly wrong and no tribunal could have made them. **(See Okeno –vs- Republic 1973 E.A. 32).**

4. The prosecution evidence in the lower court was that the Appellant was in the material period an employee of **Halima Abdi**, the complainant, who testified as PW1. On 5/11/13 the complainant discovered that several items were missing from her house. The missing items included two laptops and a computer desk top, a microwave, two sets of golden chains and a ring, all worth Ksh.203,000/= . She reported to police who came to the home and interrogated the Appellant.

5. In a bid to trace the items, police travelled with the Appellant to Nairobi but met no success. In a subsequent search, in the Appellant's house at Majengo Narok, **Cpl Kiilu (Pw2)** recovered jewellery consisting of the two gold chains and a gold ring hidden therein. The Appellant gave an unsworn statement to the effect that she resided at majengo. She denied the charges stating that PW1 only complained about the theft when she demanded her salary.

6. From the outset, I note that no records were tendered in court regarding the purchase or ownership of the goods listed as stolen from the complainant's house. Computers, being valuable goods would no doubt be receipted upon purchase. The complainant's daughter and one **Farah** who owned two of the stolen computers were not called to give evidence. The investigations in the case were carried out in a rather casual manner. While the court was entitled to believe that the jewellery in question belonged to and was stolen from PW1's house, there is no corresponding proof in this regard in relation to the electronic goods.

7. Some of the evidence received by the court through PW2 amounted to a confession under Section 25 of the Evidence Act and could only be tendered in compliance with Section 25A of the Evidence Act. It is unfortunate that the trial court seemed to rely on the said evidence in its judgment.

8. Further, the court stated in relation to the recovery of the jewellery in the Appellant's house that:

**“the recovery of the set of gold chain and ring from accused's house which items had got lost around the same time as the laptops point to accused being the only person who had stolen them. The accused did not explain how the (jewellery) found their way to her house. She is infact the one who led PW2 and PW3 to the recovery of the same.”**

9. In this case, the recovery of the jewellery in the Appellant's house could not properly form the basis for a conclusion that the same was stolen by the Appellant together with and around the same time as the computers. With regard to the jewellery, the doctrine of recent possession could be properly applied and in the absence of an explanation by the Appellant a conclusion made that she stole the said jewellery.

10. This conclusion however cannot be extended to the electronic goods in the circumstances of this case. As noted, no documentation had been tendered regarding the said goods. Secondly, the fact that the Appellant was an employee of the complainant and had access to her home, does not of itself support a conclusion that she only could have stolen the electronic goods. Several people lived in the house of the complainant and PW1 was not certain when the electronic goods were stolen. As I said earlier, the daughter who reported to PW1 about the loss of her laptop on 5/11/13 was not called as a witness.

11. The prosecution was clearly relying on the recovery of the jewellery in the Appellant's house to prove the theft of other goods. The evidence was circumstantial. In order to justify a conviction, such evidence must be incompatible with the innocence of an accused person and incapable of any explanation or hypothesis other than the guilt of the accused. **(see Kipkering arap Koskei -vs- Republic (1949) 16 EACA 135.)**

12. Further before drawing an inference of guilt based on circumstantial evidence, the court must ascertain that there are **“no other co-existing circumstances which would weaken or destroy the inference.”** See **Pravin Singh Dhalay -vs- Republic Criminal Appeal No. 10/97** and **Simoni Musoke -vs- Uganda (1958) E.A. 715**. Based on the foregoing, it is clear that the mere recovery of PW1's jewellery from the Appellant's house could not in the circumstances of this case support a conclusion that she stole the other stated goods from PW1.

13. The Appellant's defence appears flimsy, but the burden of proof lay with the prosecution and did not shift. With regard to the recovered jewellery however, the trial court was entitled to seek an explanation from the Appellant, and it properly concluded that none was forthcoming thereby dismissing the Appellant's defence.

14. In the result, I find that the prosecution only proved the theft of PW1's stated jewellery against the

Appellant. The conviction in relation to other goods listed in the charge sheet cannot stand and is set aside. No doubt the jewellery was the property of PW1, the Appellant's employer. On that basis the Appellant was liable to be convicted for the theft of the said jewellery under Section 281 of the Penal Code. I will therefore substitute the conviction accordingly with respect to the jewellery alone.

15. The Appellant has raised several matters on this appeal by way of mitigation, including the fact that she had children who are dependent on her. No previous conviction was proved against her in the lower court. In light of these matters, the charge and particulars confirmed on this appeal against the Appellant, the sentence meted out in the lower court does not seem proportionate. I will therefore interfere by reducing it to the period already served. Thus the Appellant is to be set at liberty unless otherwise lawfully held.

Delivered and signed at Naivasha, this **3<sup>rd</sup>** day of **June, 2016**.

In the presence of:-

For the DPP : Miss Waweru

For the Appellant : In person

Court Clerk : Barasa

**C. MEOLI**

**JUDGE**