REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 53 Of 2015

AKM…...…...…….……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu in Cr. Case No. 1193 of 2014 delivered by Hon. J. N. Onyiego, C.M on 27th April, 2015).

JUDGMENT

BACKGROUND

AKM, the Appellant herein was charged with committing the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars were that on 11th April, 2014 at Family Bank Limited, Kiambu Branch in Kiambu township within Kiambu County, as a cashier at the branch, stole Kshs.1,100,000/= the property of the aforementioned Family Bank Limited which came to her possession by virtue of her employment.

The Appellant was convicted and sentenced to two years imprisonment. She was however dissatisfied by the trial court's verdict and she preferred this appeal. She raised eight grounds of appeal which I have condensed as, that the circumstantial evidence tendered was not sufficient to warrant a conviction, that the trial court shifted the burden of proof from the prosecution to the defence, the trial court did not consider her defence and that the sentence imposed was harsh and excessive in the circumstances.

SUBMISSIONS.

The appeal was canvassed by way of written submissions. Those of the Appellant were filed on her behalf by learned counsel, Mr. Kamunda on 27th September, 2016. In summary it was submitted that the case was poorly investigated, the result of which was that the evidence tendered in court did not establish that it is the Appellant who committed the offence. It was the case for the Appellant that she was out of the office when the money was stolen and that the circumstantial evidence did not point to her guilt. Thus, the fact that the Appellant had not followed procedure by failing to return excess money to treasury or that she did not lock her till did not establish her guilt. Further, CCTV cameras which ought to have been working as a standard security measure would have shown who stole the money in the absence of the Appellant. It was urged that the appeal be allowed. Counsel cited the cases of **Uganda v. Sebyala & others [1969] EA 204, Republic v. Josphat Kipruto Bett, Criminal Case No. 42 of 2011(Eldoret) and Solomon Kirimi M'rukaria v. Republic, Criminal Appeal No.46 of 2011** to buttress the submission.

Learned State Counsel, Ms. Aluda submitted on behalf of the Respondent. She conceded to the appeal in that the Appellant was convicted based purely on circumstantial evidence which did not in any way point to her guilt.

EVIDENCE.

This being the first appellate court is mandated to reevaluate the evidence afresh and come up with its own conclusions. In doing so, it must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Okeno v. Republic[1972] EA 32.**

The prosecution's case was that the Appellant in the course of her duties as a cashier at Family Bank Limited, Kiambu Branch, stole Kshs. 1,100,000 which was conferred to her in the course of her duties. Coincidentally, at the same time, her fellow cashier, with whom they shared a cubicle, also lost some money. Her fellow cashier informed her superiors of the loss and after a brief search they called in the security officers who consequently called in the police. The police carried out their investigations but did not recover the money stolen. They therefore decided to charge the Appellant for the loss of monies that occurred on her ledger, Kshs. 1,100,000/=.

PW1, John Mwai Kambo the then operations manager at Family Bank, Kiambu Branch was informed of the loss of the money by the supervisor. The money was lost in the cubicle shared by the Appellant and one EK. A quick search in the bank did not yield any fruit. He thus called security personnel and police from Bank Fraud Investigation Unit (BFIU) to conduct investigations. They did a balancing of the books and was found that she had in total lost Ksh.1,100,000/=.

In cross examination he stated that the cubicle where the two cashiers served had a door with a singular key which they shared. He also testified that in some circumstances one cashier could be present in the absence of the other and that for a cashier to leave the premises they had to seek permission and that on the day in question no one had sought leave. He testified that each cashier had a metal box and a drawer for storing money which had locks.

PW2, Judy Wairimu Wanjau was a branch supervisor. She recalled that she gave the Appellant Kshs. 1,000,000/= which she requested for. She was later informed by the Appellant that some money had been lost. After a reconciliation, the lost cash was found to be Kshs. 1,100,000/ from the Appellant and Kshs. 300,000 from Elizabeth/. In cross examination, she confirmed that the tellers shared a cubicle which had a self-locking door at the back with a key that was managed by both of them.

PW3, No. 251671 CIP Alex Mwongera a document examiner in Nairobi confirmed that the Appellant had signed the treasury out slip as a confirmation that she had been issued by the bank with Ksh. 1,000,000/ and Ksh. 500,000/ respectively. **PW4, John Kingori Muchiri**, who worked at Family Bank in the department of security and investigations confirmed that he was informed of the theft. He conducted a search in the branch but no money was recovered. In cross examination he stated that a cashier was supposed to hold Kshs. 500,000 at any time and if he had in excess of this amount he was required to surrender the excess money to the strong room. **PW5, P.C Jackson Marete** was the investigations officer. He summed up the evidence of the prosecution case. After investigations, the Appellant was found culpable and charged accordingly.

The Appellant gave a sworn statement of defence and called one witness. She testified as DW1. She confirmed that she was on duty on the fateful day as a cashier. Her duties involved withdrawing and depositing customers' cash, cheques and Western Union transactions. On the material date, she worked with her colleague Elizabeth and she requested her that she wanted to go for tea. Unfortunately, Elizabeth had left the cubical. When she returned, the Appellant excused herself to go for tea. On her return from tea, she found that Elizabeth was not in the cubicle yet she had left her to man the cubicle. She had left her cash box unlocked. As she continued to work, she realized she did not have enough money after a customer requested to withdraw Kshs. 1 million. She requested for the money through an out slip from Elizabeth who had returned. It was then that Elizabeth informed her that she had lost some money from her till and had already reported the matter. She then checked the till and she too realized she had also

lost some money. They enquired from the supervisor if he had taken any money from them but he denied. After reconciliation of the cash, it was confirmed that she had lost Kshs. 1,100,000/= and Elizabeth Kshs. 300,000/=. She testified that although they were issued with boxes to store extra cash, the boxes were not lockable.

DW2, Paul Gitonga, was working with Family Bank as at 11th April, 2014. He confirmed that he was aware about the theft. His further testimony was that for the period he worked with the bank, there was no requirement that the cashiers surrendered excess cash on their possession to the treasury. All the excess money was kept in boxes allocated to cashiers that were not lockable.

DETERMINATION

The task for this court is to determine whether the case was proved beyond a reasonable doubt. The conviction of the Appellant was purely based on circumstantial evidence. No direct evidence existed as no one saw the Appellant stealing the money. But again, circumstantial evidence is as good as direct evidence where it is demonstrated that the same is so strong that the inculpatory facts are inconsistent with the innocence of an accused person. That is to say that the evidence availed irresistibly points to the guilt of an accused person to the exclusion of all others. An avalanche of case law does exist in guiding the courts on the principles to be applied where the court should convict based on circumstantial evidence. In **Abanga alias Onyango vs Republic Cr. No. 32 of 1990 (ur)** the Court of Appeal stated as follows:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be draw, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else".**

The words were reiterated in the well renowned case of **R vs Kipkering Arap Koskei & another 16 EACA 135** where the Court held:

> **"in order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt'**

And in **Sawe vs Republic [2003] KLR 364,** the Court of Appeal affirmed that position in the following words:

> **"There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused".**

A summary of the evidence of prosecution witnesses no doubt reflects a casual manner in which it was tendered. Safe to say that the Appellant occupied the cubicle from which the money was lost, it was not demonstrated how or what role she played in the loss of the money. Suffice it to say, she did not occupy the cubicle solely. She shared it with one Elizabeth. The cubicle only had one key shared by the two occupants. Her defence was that, when the money was lost, she had stepped out of the cubicle and left Elizabeth behind. The said Elizabeth also lost some money. It begs how and why the prosecution singled out the Appellant as the culprit and not the said Elizabeth. The fact is that any of the two could have opened the cubicle and stolen the money. Further, it was not demonstrated that other bank workers never had access to the cubicle so as to exclude them as possible culprits. Although the prosecution tended to advance a case that the Appellant should either have locked her box or surrendered the excess cash in the strong room, that evidence was shaken by the Appellant's witness who had experience with the bank and testified that the boxes issued to cashiers were unlockable. Furthermore, the door to the cubicle was

accessible to other bank workers as long as the cubicle was active. Thus, only through the help of CCTV cameras that the thief would have been found. This security system was not shown existed exposing the bank to a lot of risk. It raises doubt in those circumstances that the theft could only have been linked to the Appellant.

I concur with the Appellant's submission that the police investigations were shoddy and did not meet the threshold required to prove the case beyond a reasonable doubt. The key witnesses were PW1, 2 and 4. The main evidence was of PW1 and 2 that the Appellant had been allocated money in the course of her work as a cashier and that after reconciliation, the sum of Kshs. 1,100,000/= was lost. PW3 on the other hand was a security guard who participated in conducting a search in the bank. On the whole, their evidence did not add much credit to the heavy burden that lay on the prosecution to prove their case beyond a reasonable doubt. It is trite that that burden does not and can never shift upon an accused to prove his/her innocence. See **Woomington vs DPP [1935] AC 462.** The Appellant may not have told the whole truth about her movements on the said day. Nevertheless, she was not required to aid the prosecution in filing any gaps in their case. The result of my findings is that this appeal must succeed, in any event.

On the issue of sentence, the Appellant was sentenced to two years imprisonment. She submits that this was harsh in light of her mitigation. It is clear on the record that the court did consider her mitigation. She submitted that she was a first offender and that she had co-operated with the prosecution. The offence holds a maximum sentence of seven years imprisonment. Sentencing is in the discretion of the trial court. An appellate court will not disturb the sentence imposed unless the trial court did not apply the law or applied the wrong principles or did not take into account relevant factors while sentencing. In the present case, the sentence of two years against a possible seven years jail term was not unreasonable. However, the Appellant was a first offender and the amount of money involved was not so large as to attract a custodial sentence without the option of a fine. Therefore, had the court dismissed the appeal on conviction, it would have imposed an alternative of a non-custodial sentence.

In the result, this court finds that the prosecution did not prove the case to the required standard; beyond a reasonable doubt. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi this 9th day of November, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Kamunda for the Applicant

2. M/s Sigei for the Respondent.