



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 69 OF 2013

KINYA BEATRICE APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

From original conviction and sentence in Cr. Case No.572 of 2011 at the Chief Magistrate's Court Embu by HON. P. BIWOTT- SPM on 23/10/2013

J U D G M E N T

1. **KINYA BEATRICE**, the Appellant herein was charged and convicted of eleven (11) counts of theft by servant contrary to section 281 Penal Code and sentenced to three (3) years imprisonment on each count. She was also charged with one count of stealing contrary to section 275 of the Penal Code and upon conviction was sentenced to one (1) year imprisonment. The sentences are to run concurrently.
2. She was aggrieved with the Judgment and appealed against both conviction and sentence citing the following grounds;
 - i. The trial Magistrate erred when he failed to consider that the alleged offence was committed at Meru but complainant reported incident at Embu Police Station six (6) months after occurrence of offence.
 - ii. That the learned trial Magistrate erred when he failed to consider that no documentary evidence was produced in Court to prove that Appellant was employee of the complainant.
 - iii. That the learned trial Magistrate erred when he failed to consider that the alleged transaction documents were not produced in Court to prove that the alleged money was stolen from the complainant.
 - iv. That the learned trial Magistrate erred when he failed to consider that there was grudge between complainant and Appellant as a result of business competition that lead to her frame the allegation of stealing against the Appellant.
 - v. That there was no document produced in Court connecting the Appellant to the transaction as in Court.
 - vi. That the complainant was not the legal owner of the alleged business and there was no anytime Appellant was an employee of the complainant.
3. The prosecution case is premised on the evidence of eleven (11) witnesses. The complainant - Laurencia Murocia (PW1) explained that the Appellant was her employee in her Mpesa business "**Bonanza Enterprises**" Ngundune market of Meru County. The Appellant was trained and knew all PIN numbers of all phones operating in all the other shops. In July 2009 she noticed that float money was missing from the head office. Her opening stocks were shs.100,000/= and kshs.60,000/= respectively.

4. On 31st October 2009, PW1 sat with the Appellant and did the balancing when she realized that there was no money. The Appellant raised many excuses over the missing cash. On further checking she noticed that the Appellant had been taking money and not signing for it or it was being diverted to other accounts with no entries and/or records.
5. An Account on phone NO.017989023 had been a recipient of shs.60,000/= from her money. The registered owner was **SERAH MWITI**. When on 30/10/2009 she discovered shs.15,000/= missing from the business, she received a message from line No.071841099 informing her that her money would be refunded (EXB1). The next day she received shs.14,970/= from **Derrick Kimathi** via No.0178417240 from the shop where the Appellant worked.
6. The Appellant was found to have two lines i.e. **0712352708** registered in the name of **Beatrice Kinya** and **0710887025** in the names of **Purity Ntinyari**. The said deposits were made from her shops to the Appellant's line No. **0710887025**;

- 26th August 2009 - kshs.5,015/=
- 5th September 2009 - kshs.6,000/=
- 14th October 2009 - kshs.5,000/=
- 31st February 2009 - kshs.10,000/=
- 15th September 2009 - kshs.10,000/=
- 22nd October 2009 - kshs.5,000/=
- 21st September 2009 - kshs.6,000/=

Safaricom Ltd availed details of the two accounts (EXB 3-4). Agent record sheets from July to November 2009 were also produced (EXB 5-6). In their business transactions, they could send money to the Appellant on No. **0710887025** and the name generated would be **Purity Ntinyari** yet they knew her as **Beatrice Kinya**.

7. The I.D. Card of PW1's daughter Faith Kendi ID No.29470900 was used by the Appellant for customers who never produced ID cards and it had been used to register Serah Mwititi who had received kshs.60,000/= from PW1's shop (EXB12). These matters were then reported.
8. PW7 – Ruth Gacheru Marimba and PW9 – Jackline Tlinyori Ringera worked with the Appellant in the Mpesa business of PW1. In their business transactions they could send money to the Appellant on No.0710887025 and the name generated would be Purity Ntinyari yet they knew her as Beatrice Kinya.
9. PW10 an accountant auditor audited the Mpesa Accounts of PW1. He found that the 1st Appellant an employee of PW1 had done the following;
 - July 2009 on divers dates had withdrawn shs.47,745/= in the name of Beatrice Kinya.
 - July 2009 she withdrew a total of shs.111,427/= in the name of Purity Ntinyari.
 - September 2009 she withdrew shs.146,992/= in the name of Purity Ntinyari.
 - October 2009 – she withdrew shs.82,645/= in the name of Purity Ntinyari.
 - November 2009 – she withdrew shs.62,795/= in the name of Purity Ntinyari.
 - She withdrew shs.60,000/= in the name of Serah Mwititi and shs.17,000/= in the name of Abdalla Bauja. He produced the audit report as EXB37.
10. In her defence, the Appellant admitted having been employed by PW1 but denied stealing from her. She said she would faithfully distribute money to the Mpesa shops of PW1. When she left to join Chuka University, one Faith Kendi took over from her. That PW1 refused to release to her her monthly pay of shs.2000/=.
11. This is a first appeal and I am enjoined to reconsider and evaluate the evidence on record and arrive at my own conclusion. I do bear in mind that I did not have the advantage of seeing or hearing the witnesses testify. See **OKENO –V- REPUBLIC [1972]EA 32; MWANGI –V- REPUBLIC [2004]2 KLR 28; SIMIYU & ANOTHER [2005]1 KLR 192**
12. When this appeal came for hearing the Appellant presented the Court with written submissions. She states that no document was produced to show that she was an employee of PW1. And that material witnesses were not called to testify. Mr. Miiri for the State opposed the appeal saying the

- evidence by the prosecution witnesses was well corroborated.
13. I have considered the evidence on record plus the findings of the trial Court. I have equally considered the submissions by the Appellant and the State. In her defence and written submissions, the Appellant admits having been an employee of PW1. The evidence is that she worked in the Mpesa main shop of PW1, collected money and distributed it to the other shops. The Appellant operated two Safaricom lines, one was in her known names and another in the names of Purity Ntinyari and the identity card used to register it was of Faith Kendi a daughter of PW1.
 14. Faith testified as PW2 and told the Court what she knew about the transaction. The Appellant did not at any time ask the witness anything on the allegations she made against her in her defence.
 15. The audit report gave details of how the money was craftily stolen. The records from Safaricom and the evidence of PW1 confirmed that Serah Mwititi never existed. The Appellant was found to operate an account using Purity Ntinyari's name. Purity Ntinyari was found to be the Appellant's mother. Her co-accused operated the account with Serah Mwititi's name. Both accounts were opened using PW2's identity card details. The person who could have easily accessed PW2's details was the Appellant who worked with her and at one point stayed with her in the same house.
 16. Having been employed by PW1 in her Mpesa shops and having been entrusted with all that is required including PIN numbers, the Appellant decided to use that information to steal from her employer.
 17. The issues she raises in her appeal on all grounds have very well been covered by the evidence on record. The audit (EXB 37) report confirms theft and how it was perpetrated. The Safaricom records show how the money was withdrawn and to whom it was sent and who received it. PW3 and PW9 who worked with the Appellant explained how they would send her money to cover and/or clear shortages to No.0710887025 which gave the names of the recipient as Purity Ntinyari. They explained this very well. The audit report shows that PW1 lost a total of shs.570,825/=. The losses were linked to the Appellant and his co-accused.

I am satisfied that the learned trial Magistrate analysed the evidence well and arrived at the correct decision. I have no reason to interfere with it. The Appellant was sentenced to serve three (3) years imprisonment on each of the first eleven counts and one year imprisonment on the 12th count. The sentences are lawful and considering how much PW1 lost due to the Appellant's untrustworthiness, I see no reason to make me interfere with the sentence.

The upshot is that the appeal is dismissed.

Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

M/s Ingahizu for State

Mutero/Kirong

Appellant