



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
Criminal Appeal 160 of 2009

**IBRAHIM MOHAMMED ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged jointly with another with the offence of stealing by servant contrary to Section 281 of the Penal Code. It was alleged in the charge sheet that on diverse dates between 1<sup>st</sup> July, 2008 and 15<sup>th</sup> August, 2009 at Standard Chartered Bank Kenyatta Avenue Branch jointly being servants of Image Registrars as messenger and accountant respectively, they stole a sum of Kshs. 748,000/= which came to their possession by virtue of their employment.

After a full trial the appellant's co-accused was acquitted while the appellant was convicted and sentenced to 2 years imprisonment. This is an appeal against both the said conviction and sentence. The record shows that he applied for bail pending appeal which was allowed on 19<sup>th</sup> May, 2009.

There are several grounds of appeal as set out in the petition filed by the appellant on 21<sup>st</sup> April, 2009. By an order made on 11<sup>th</sup> June, 2012 counsel agreed to argue the appeal by way of written submissions which are now on record. I do not deem it necessary to go over the grounds of appeal and the submissions set out by the appellant in their totality because, the learned counsel for the Republic in his submissions concedes the appeal and rightly submits that there was not sufficient evidence upon which the appellant's conviction could be founded.

The appellant was a messenger at the offices of Image Registrars. The evidence adduced shows his duties entailed among other things, going to the bank to draw cash by cheques drawn on the complainant's accounts. The cheque book was in the custody of his co-accused who was acquitted. On withdrawing the money, he would deliver the same to his co-accused who was the accountant. At no time did he have access or custody of the said cheque book. There was evidence that the appellant may have withdrawn the amount so stated because there was evidence recorded by the CCTV cameras showing his presence at the bank. However, this is not peculiar. His duty was to go to the bank and withdraw money. That evidence

alone cannot be incriminating against the appellant.

If the counterfoils relating to these cheques were plucked out of the cheque book, this cannot be attributed to the appellant who had no access whatsoever to the cheque book. There was no evidence adduced that the appellant did not hand over the said sum to the accountant. Indeed, P.W. 1 who is one of the directors of the complainant company said that he did not know whether or not the second accused received the money.

Contrary to the evidence relating to the handwriting on the cheque, P.W. 2 stated that the handwriting thereon belonged to the appellant's co-accused. In view of the evidence that is on record, I agree, with respect, the same is speculative and therefore the conviction of the appellant was unsafe.

Accordingly, the appeal is hereby allowed and conviction quashed. The sentence imposed upon the appellant is accordingly set aside. I have noted herein above that the appellant is out on bail pending appeal. It follows that the terms of his release on bail made on 19<sup>th</sup> May, 2009 are hereby vacated. If any cash bail was deposited as ordered the same shall be released to the appellant forthwith.

Orders accordingly.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2012.**

**A. MBOGHOLI MSAGHA**  
**JUDGE**