



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 523 of 2010**

**ALIEFYA ALIASGHER.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 1916 of 2007 in the Chief Magistrate's Court at Nairobi – Mrs. S. K. Muketi (SRM) on 18/4/2009)*

**JUDGMENT**

1. The accused, **Aliefya Aliasgher**, was convicted of stealing by servant contrary to **Section 281**, of the **Penal Code**. It had been alleged that on diverse dates between 19<sup>th</sup> December 2006 and 22<sup>nd</sup> February 2007, at Mona Bureau de Change situated at Panari Sky Centre along Mombasa Road in Embakasi division, being a servant of the said establishment and working as a cashier, stole Kshs.4,496,398.12 which came into her possession by virtue of her employment.
2. Upon conviction the learned trial magistrate sentenced the appellant to a fine of Kshs.400,000/=, in default to serve 2 years imprisonment.
3. Mr. Githinji, learned counsel for the appellant, submitted that the judgment did not lay out the facts or exactly what was to be proved. That the computer generated documents adverted to were not produced in evidence because they had no certification to show who extracted them, and the learned trial magistrate should not have therefore, relied on them in her judgment, when she herself rejected their production.
4. Mr. Githinji submitted that the charge sheet talked of Kshs.4,496,398.12. and that **PW4** the auditor, merely copied these figures and found the same amount to be missing to the last 12 cents. The learned counsel submitted that this did not amount to corroboration as was found by the learned trial magistrate who did not delve into the audit findings, and that for the appellant to be convicted, there should have been proof of injection of finds into the bureau, and further, proof that the cash was under the appellants control.
5. Mr. Githinji also submitted that the conclusion of the learned trial magistrate that it beat logic why the appellant was employed if the employer did all the work, had no basis in law and was wrong, and that there was absolutely no evidence showing how the Kshs.4 million was stolen. That this was a running business yet the appellant never signed for receiving any money from the cashier she took over from,

and the Auditor did not produce any banking information to show that the bureau banked any money and where from.

6. Mr. Githinji further urged that the defence was not considered, since the trial magistrate did not state what the appellant said in her defence and why it was rejected. Further, that for anything to be capable of stealing it should have been received, and that the 20,000 US dollars in question was transacted over the counter with no record of what transpired.

7. That even the Auditor was not certain that money had been received by the bureau or what happened to it. He urged the court to find that the evidence was not sufficient to sustain a conviction, and allow the appeal.

8. The learned State Counsel Miss Kuruga opposed the appeal on behalf of the respondent. She submitted that the appellant was in charge of the cash and had the duty to hand over cash to the manager, and that she failed to do so over a period of time. That she was entering the figures of the transactions into the system herself and in the end the figures did not tally.

9. Miss Kuruga urged that on **19<sup>th</sup> December 2007** the appellant was given 20,000 US dollars, whose receipt she acknowledged but she did not enter it anywhere. That **PW3** explained how the computer soft ware used at the Bureau had two levels of reporting, and could verify the entries, and provide back up, and that this was how the inconsistencies shown in exhibit 2 were discovered.

10. Miss Kuruga also urged that **PW4** who did the audit certified that indeed there was shortage, and to prove that indeed the appellant was in charge, **PW2** testified that whenever she was away she would send her husband to take the keys to the Managing Director. She was also the only employee who handled cash and the shortage occurred during her watch.

11. Miss Kuruga further urged that **Exhibit 8** showed that she took over keys to the safe and strong room where the money was kept, and was also in custody of the entire office files and the currency. Finally that there is no requirement by law that for something to be stolen it must first be received by the accused.

12. It was Miss Kuruga's view that the learned trial magistrate did not err in convicting the appellant and that she was quite lenient in her sentence considering the amount stolen and the fact that it was never recovered.

13. The appellant was charged under **Section 281** of the **Penal Code** which provides as hereunder:

***“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”***

14. The definition of stealing as provided under **Section 268(1)** of the **Penal Code** states that:

***“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”***

15. I have therefore scrutinized and re-evaluated the evidence on record to establish whether the requirements of the two sections set out above were satisfied. In so doing I have been ever mindful of the fact that I did not have the opportunity of seeing and hearing the witnesses as they testified.

16. From the evidence it was not disputed that the appellant was employed by the complainant as a cashier, at Mona Bureau de Change, at the material time. She was therefore the complainant's servant at the relevant time. The more irksome questions is whether the prosecution proved that the Kshs.4,496,398.12 shown in the charge sheet as having been stolen by the appellant ever came into her

possession on account of her employment or at all, and if it did whether she stole it.

17. It was the testimony of **PW2** the complainant herself, that she could not tell how much money she handed to the appellant in total, over the period under question. Such monies having not been recorded by the complainant nor acknowledged anywhere by the appellant. The evidence entails on record the complainant's assertions in court, that she injected cash into the business daily, but she provided no documentary evidence to show that indeed such monies came into the business, that theft was involved, and that the loss was not merely due to the poor management and performance of the business.

18. The audit report which should have provided insight on the movement of the cash and how it was lost, was of little probative value to the case. It did not show instances of what money came in, what should have been recorded, the actual entries made and hence the deficits, which the report could go on to state, was unexplainable on any other hypothesis other than that the appellant stole the missing cash.

19. The 20,000 or 22,000 US dollars alluded to in evidence, has no paper trail showing it changing hands from the complainant to the appellant and thereafter disappearing. The money appears to have been handed to the appellant at the counter casually, and she, equally casually, handed it over to a manager of Panari's Sky Centre. That manager was not questioned or called to confirm or deny that he received the money in question.

20. The prosecution did not produce any bank statements to show that whereas the records at the Bureau showed that a certain sum of cash, was scheduled for the bank on a given date, a lower sum of cash was actually banked, or that there was no banking at all. Indeed the court was not shown any evidence of bankings from the Bureau or that the appellant was responsible for banking.

21. The appellant's own testimony was that the complainant kept the money in the office safe, and handed it to her in her cubicle at the counter whenever she needed it to serve a customer. Further that the complainant did the banking herself.

22. I note that the confession by the appellant that she took 20,000 US dollars from the complainant, came 8 months after the fact, at a time when she was threatened with arrest, and was prevailed upon to write the confession to avoid arrest. It was proper that the trial court refused to allow it in evidence. In any case the appellant does not deny that **PW2** handed her the 20,000 US dollars. Her assertion was that, just as it was handed to her over the counter without any record thereof, she too passed it on over the counter without record.

23. The complainant's assertion is no more weighty than that of the appellant, and that being the scenario benefit of the doubt operates in favour of the appellant.

After careful consideration and re-evaluation of the evidence on record, I find that the appeal is meritorious, and I grant it.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this 5<sup>th</sup> day of **November 2012**.

**L. A. ACHODE**  
**JUDGE**