



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 322 of 1996**

**PRISICA WAMBUI WANGOMBE..... APPELLANT**

**Versus**

**REPUBLIC..... RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No.284 of the Resident**

**Magistrate's Court at Kwale - J.Nyaga, Esq., R.M.)**

**JUDGMENT**

This is an appeal from the Judgment of the Resident Magistrate at Kwale against both conviction and sentence.

The Appellant, Prisilla Wambui Wangombe, was arraigned before the Resident Magistrate's court on the 6th of March, 1995 to answer to the charges of stealing by servant contrary to section 281 of the Penal Code. Before the close of the prosecution case the charges were amended as to the particulars of the offence - namely:

"On the 25th of February, 1995 at African Sea Lodge in Diani Beach of Kwale District within the Coast Province, being a servant of Alliance Hotels as a receptionist stole sum of Kshs.505,449.05 the property of Alliance Hotels which came into her possession on account of her employment."

A plea of Not Guilty to the charge was entered. The prosecution called a total of 13 witnesses complying with the required "chain of events" needed to support any evidence given by the prosecution. The Appellant called one witness and also gave evidence on her behalf. She was represented by two advocates in the lower court at different stages. During her appeal at the High Court Mr. Musinga represented her and argued the appeal before me.

The facts are well laid down in the proceedings of the lower court. A brief summary of the same is as follows:-

The Appellant was employed as a receptionist in the said named hotel. She was not in charge of the cash nor was she permitted to handle any cash. Nonetheless, on the material night of 24th/25th of February, 1995 she managed to persuade the then cashier - PW.3 -one Terry that they leave work together to go off duty. In the meantime, if she could deliver three sealed envelopes to the safe, for safe custody. PW.3 gave her three envelopes that contained moneys from her various transactions. These moneys included foreign exchange and Kenyan cash amounting to Kshs.505, 449.05.

The Accused never delivered the envelopes nor did she come back to PW.3. PW.3 made a report to her superiors who promptly took her to the police station. She was placed in the cells for 2 days but later

released and treated as a prosecution witness. I believe that she was in fact charged.

Evidence though revealed how PW.1 a driver of the Accused boyfriend (PW.2) who drove a taxi owned by PW.2 was sent with PW.2's brother one Chege (PW.4) to the hotel. It was usual to pick up the Accused from the hotel. On that day the taxi collected three envelopes handed to them by the Accused. The taxi went to PW.2's house. It was noted that the Accused lived with PW.2 although she also had her own place. Their relationship was so close that she was to be in advance stages of being married to PW.2.

The Accused arrived at the house soon after. She took the three envelopes - a key dropped out but this was not noticed until PW.2 was questioned about it later. He produced it and handed it over to the investigating officer. It transpired that the key was the safe key.

The Accused and PW.2 left Diani and proceeded to Mombasa. They took a vehicle and went to Ngong where they stayed for 2-3 days. Later the Accused/Appellant proceeded to Nyeri her home area.

It was thereafter concluded when the theft that PW.3 had committed the same. The Appellant was nowhere to be traced.

It also transpired that the Appellant's father was the officer commanding a police station.

After the Accused/Appellant had gone to PW.2's house from the hotel on the material night they proceeded to her sister's house whereby she counted the money in the envelope which amounted to Kshs. 99,000/-. She directed that same be given to her father. She did not explain to PW.2 where the moneys had come from.

The prosecution then called the Financial Controller (PW.5). The safe rental, in-charge of safe keys in the hotel but independent company (PW.6), PW.7 a cashier, PW.8 a taxi driver who recalls seeing the Accused walk from one hotel to the other within the same premises on the material night, the in-charge of the cash register PW.10, the night Manager PW.11, arresting officer PW.12 and the investigating officer PW.13.

In her defence the Accused denied ever taking the said envelopes. She stated that Terry PW.3 was lying. She left work in the normal way, was checked at security point. She had in fact called DW.2 a security officer to confirm this.

In her memorandum of appeal the Appellant had filed eight grounds of appeal. Her advocate abandoned ground No.3. She did not think it necessary to argue Ground No.7.

What was important was ground 1, 2, 5, & 8.

1. The learned Resident Magistrate erred in law in accepting as credible the evidence of PW.2 who openly confessed that he had been jilted by the Appellant.
2. The learned Resident Magistrate erred in law in accepting as credible the evidence of PW.3 who was previously charged jointly with the Appellant before she was made a prosecution witness.
5. The learned Resident Magistrate erred in law in holding that the Appellant had stolen money amounting to Kshs.505,449.05 by way of Kenyan currency, foreign currencies and credit cards.
8. The sentence meted out against the Appellant is harsh and excessive considering that she was a first offender.

Looking at the above grounds on those relied on in general.

On Ground 1 it is true that PW.2 was boyfriend to the Accused. The relationship was so strong that the witness had visited the parents home with intention of marriage. It was further noted that after her arrest

the relationship began to go sour. PW.2 owned a taxi. He gave it to PW.4 his brother Chege to manage and hired PW.1 as a driver. On the material night the vehicle was to be parked at the police station for safe custody. This was unusual as all civilian vehicles are not generally parked at the police station.

Thereafter on his return from safari the vehicle was not released. The one who would have so released it apparently was the father to the Accused who claimed that the daughter owned half share of the vehicle.

The other aspect was PW.2 suspected the Accused had another boyfriend.

It is to this evidence that led the advocate put forward a case that the evidence given by PW.2 was so done out of malice and grudge. She implied his evidence should not be relied on.

In Ground 2 - PW.3 Terry - the cashier who was subsequently arrested and charged with the offence but was later treated as a prosecution witness was a witness also who should not have been relied on.

In the above two grounds it may be true that the probability of a grudge on a co-accused may prejudice the Appellant's case. The prosecution though has a duty to present all their evidence before the court to be decided whether that evidence is for them or against them.

It is also very important to note that there were independent witnesses from the two who were able to confirm certain facts of the case.

I must say that this case had an extremely well laid chain of events clearly showing how the Appellant handed over the three envelopes to PW.1 & 4. That is a fact that is not disputed. How the envelopes were taken to PW.2 and the Appellant, who came soon after, went to her sister with the envelope. The same was opened and moneys found therein and counted. The balance was to be given to her father.

There was allegation of discrepancies and timings in the prosecution evidence.

This though are not discrepancies as such.

It is true that the trial Magistrate ought to have taken PW.2 & 4's evidence with caution but they were not single witnesses. In fact 5 persons in total saw the Appellant with the envelope.

Besides PW.1, 2, 3 & 4; PW.10 noted how the Appellant had left the envelopes on a table to go and answer a telephone call. She returned soon after she picked the envelopes and left.

Ground 5 of the appeal concerns the amount of moneys said to have been stolen.

The amount of Kshs.505,449.05 was made up as follows:

Kshs.88,108.80 61,199.05

Travellers Cheques....164,193.95

Cash Foreign Currency...76,331.50

Credit Cards Visa.....54,141.20

Float.....2,000 . 00

Balance.....59,479.55

505,449.05

Although Travellers Cheques, cash foreign currency, credit cards was reflected in Kenya Shillings. I

believe that this was in fact equated to be equivalent of Kenya Shillings. Is the accused stating that this ought to have been queried? It was not "in the main trial.

In any charge-sheet the Accused is to be informed exactly what she/he stole. In this case she was on the whole amount was bumped together as one sum. I do not nonetheless see this as any miscarriage of justice. The Accused had the opportunity to question these figures.

Her defence has always been that PW.3 never gave her any envelopes.

Evidence before court, from the Financial Controller and cashier shows the registering of the amount of moneys and transactions done by PW.3. How she placed intact the days collection in three envelopes. She had sealed the safe key in the envelop.

She has unfortunately since been relieved of her duties.

The prosecutions case was supported by the State Counsel citing overwhelming evidence but left the issue of sentence to the court.

I would from the evidence on record dismiss the appeal against conviction. I am satisfied that the trial Magistrate correctly convicted the Appellant for the said charges.

As to the sentence, the advocate for the Appellant said this was harsh. An offence for stealing by servant contrary to section 281 of the Penal Code carries a maximum sentence of 7 years. 3 1/2 years imprisonment was lenient.

For a daughter of a police officer who was in fact an officer-in-charge of a police station where the offence occurred is most serious and deterrence was called for.

The appeal on sentence is also dismissed.

Dated this 9th day of May, 1997 at Mombasa.

M.A. ANGAWA

JUDGE