



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION- MILIMANI COURT**  
**CRIMINAL APPEAL NO. E006 OF 2024**

**JAIRUS  
SHAIMALA.....APPELLANT**

**KATERE**

**VERSUS**

**REPUBLIC.....**  
**.....RESPONDENT**

*(Being an Appeal from the Judgment of the Hon. Gilbert O.  
Shikwe (PM)  
at the Chief Magistrate's Court Milimani Criminal Case No.  
1410 of 2018 delivered on 23<sup>rd</sup> January 2024 by Hon. Gilbert O.  
Shikwe -PM)*

**JUDGMENT**

1. The Appellant herein **Jairus Katere Shiamala** was charged with the offence of stealing by agent contrary to Section 283(b) of the Penal Code.
2. On 23<sup>rd</sup> January 2024 in MCCR No. E1410 of 2018 he was sentenced to serve 12 months non-

custodial sentence and fined a sum of Kshs 20,000/- by Hon. Gilbert O. Shikwei (PM)

## **TRIAL COURT PROCEEDINGS**

### **PWI. PATRICK OTHIKURI MAMUSENDE.**

1. PW1 stated that he was resident of Mbotela Estate and he used to work as a security guard as from the year 2007 up to 2015. By then he used to work as a private guard for one Jajit Flora. He used UK Co. at Westland. He used to guard homestead of Jajit Flora at night. He lost the said job. On the night of 9.9.2015, a tenant came to visit his boss Jajit. It was around 6:00pm. The said visitor went straight into the house of his boss and the two talked upto 11:00pm. As she left the two even talked at the gate. But when the said tenant just left the gate, his boss went told him that he had lost his Job. He was not given document terminating his employment and he was also not given a formal letter of employment. He was ordered to leave the premises which he did.
2. He later visited the accused who was a former member of a private security union. Pw1 had been a member of the union for 4 years. He called the accused and told him that he had been sacked by Jajit because of being a member of the union. He

went to the accused's place. The accused told him that his friend will talk to his boss. He did not know if they ever talked. Later his boss called and requested him to visit her with one George who was also his fellow employee at her premises.

3. They passed by the accused's office and informed him about the same. He arrived at his boss place and found George who was a fellow employee. Upon arrival at his boss's place the boss paid him his total earned salary plus leave payment However she never paid him for the services this prompted him to go back to the accused who in turn wrote to his boss a letter requesting her to appear before the Labor Offices. He learned about the letter from a reply letter dated 14.12.2015. That they were summoned at the Labor offices together with George and Jajit Flora was ordered to pay services for the period the he had worked for her. She requested to be given two weeks, they went back to the labour office after two weeks. That this time he did not get inside the office only the accused and his boss went inside and after 30 minutes they came back and told them to leave.
4. He later learnt from the Labor Officer, Eunice Juma that Jajit had paid for his services to the accused.

The labor officer told him to report him to his boss namely Isaac Dudamba.

5. He eventually reported the accused to his said boss namely Isaac Dudamba who called his file from the labour offices, Issac Dudabwa later summoned them at his office when they were shown two cheque payments which Jalit had issued for the services of George and him. He never saw the said cheques. The said cheques payments were for Ksh.28.386/=.

He said he did not know who received the said cheque payments.

6. During the said meeting the accused alleged that the said cheques got lost. However, he never reported the same at any Police Station. The accused was further directed by Mr. Dubabwa to record a statement over the said cheques dated 29.9.2016 and address the letter to him. In the letter the accused admitted to having used the said cheques and requested for more time to replenish the same.

Letter dated 29/9/2016- MFI-P-2

7. The accused failed to repay him the money. Consequently, he went to Central Police Station and reported vide OB No 27/30/9/2016

8. Later, the Accused person agreed to repay the amount in instalments and reduced the proposal in an Agreement letter dated 27.10.2016 MFI -P -3, Accused failed to honor the Agreement.

### **CROSS EXAMINED BY THE ACCUSED**

9. He knew him since the year 2012 as a member of Kenya National Private Security Workers Union. He came in the labor offices over this matter with George Okaka. It was his cheque which was said to have been stolen. He was claiming Ksh 62,988/- from him. His services payment was Ksh. 50,000/- while summary dismissal was Ksh.12,000/-
10. It was not true that he was summarily dismissed because of being drunk at the place of work. It is therefore not true that he was not entitled to any service payment. It is not true that he paid him Ksh.28,204/ after the same had been deducted from his salary. He did not know his Union wrangles with Isaac Dubabwa. He never received any payments from him concerning this matter.

### **RE- EXAMINATION**

11. It was true that the accused negotiated for our salary as from Ksh.6000 per month to Ksh. 12,000/= . He never received any of the accused's salary for the month of September 2016 over

matter. He had never received Ksh.28,306/ from the accused. It was the accused person who prepared the agreement marked exhibit P-3 by further disclosing his ID card number therein. He had not been used by Isaac Dudabwa just to frame up the accused with this matter. He had no time frame to which he was supposed to lodge this complaint over the accused.

### **PW2- KWAMBOKA ONYANCHA**

12. She stated that she was an advocate operating a law firm. Previously she was a Legal Officer at Kenya National Private Security Workers Association. On 27/10/2016, the accused was her colleague, she was the Administrator and the accused was the Dispute Resolution Officer.
13. She witnessed an agreement he had with the complainant dated 27/10/2016 with regard to payments accused was to make. She stated to have witnessed the agreement only but she did not prepare it. She said that she was not aware if the agreement was executed.

### **CROSS EXAMINED BY ACCUSED PERSON**

14. She testified that she only witnessed the negotiations the accused had with the two complainants. He was the Dispute Resolution Manager of the Union. She was not aware of the witty of the dispute. She only signed the agreement but she is not author.

**PW3 ISAACK DUDABWA**

15. He stated that he was the founder of Kenya National Security Workers Union and he employed the accused at around 2012. On 1/4/2016 the accused was taken to headquarters to serve as a dispute officer, That he received various complaints by Patrick Shukwei. He realized that the accused had collected the cheques of Ksh.42,306 and 28,204/ on behalf of Patrick Shukwei and George. He undertook to have the issue sorted out of court. He instructed PW2 the legal officer to have an agreement where the accused committed to pay back the money but, the accused never made good all his deal. Which prompted Patrick to lodge a complaint with the Police. He had certificate of payments (P Exhibit 4)

**CROSS EXAMINATION BY ACCUSED**

16. He stated during cross examination that he had known the accused since 2012 and he had the contracts of his employment. He did not have records to show how the cheques were cashed as it was the accused who collected the cheques from the clients. He also stated that cheques are paid at the office and not in the streets.
17. Pw3 denied authorizing deduction of ksh 28,000/= to be paid Patrick Shukwei. He said that only the accountant could answer that. He also stated that he was a witness and he did not report the matter to the police.

### **ON RE-EXAMINATION**

18. He said that did not authorize any payments of salary deductions to be paid to Patrick from accused's salary.

### **PW4 NO. 78031 POLICE CONSTABLE**

### **MAXWELL OTIENO**

19. PW4 NO. 78031 Police Constable Maxwell Otieno from

Central Police Station testified that he was the Investigating

Officer, he was handed over the case on 13/3/2020 when the

matter was already in court and that he took over the file

and exhibits. He ensured witnesses attended court.

He

perused the file and ensured all witnesses were presented

in court.

**CROSS EXAMINED BY ACCUSED PERSON.**

20. He stated during cross examination that he testified on the content of the file he was given.

**DW1 - JAIRUS KATERE SHIAMALLA.**

21. He worked with Kenya National Union of Domestic Workers. He was the accused in this case, He was employed in July 2011 as an organizer. He was then appointed as Dispute Officer in Nairobi Branch and transferred to Head Office and appointed as an Industrial Officer. He had recruited members working for Flora Jajit in Westlands from 2013 to 2015 where they were terminated. The first to be terminated was PW1, a month later George Akaka a colleague to PW1 was dismissed. We commenced negotiations on their payments. Initially they had been paid some money. George was paid Ksh. 29,950/- and PW1 was paid Ksh.27,952 which was not enough.

22. He reported a formal dispute to Ministry of Labour. After consultation on 1/3/2018 it was agreed the 2 be paid George was paid Ksh. 42,306/- vide cheque No. 750435 and PW1 Ksh.28,204/= vide cheque 754037. When the employer delivered the cheque, PW1 was not there George was given his cheque. He went back to office with PW'1 cheque and certificate of payments made the envelop as he was changing desks I was unable to send the cheques.
23. PW1 then reported the matter to General Secretary who advised he reports to Central police station. He was summoned to the station and they talked to PW1. It was not known who cashed the cheque. They agreed together with PW3 that he be deducted Ksh.28,214 from his accounts which was done on 4/10/2018. PW1 was given the money in his presence. Afterwards, PW3 claimed he had done the wrong computation and he did his own computations and insisted he pay Ksh.2500 for 13 months for each. PW1 was to get Ksh.33,000/- and George was to get 34,371/-. He then transferred him to Kisumu in November as an organizer, he declined the offer and wrote him a letter asking for his dues. He declined and he had subsequently visited the office demanding his dues then he told him he won't pay him.. He got

another job where he interviewed and was later fired. Also, at another place where he was fired.

24. He registered a trade union which was what triggered this case. He had also filed the case at Employment Court. **If one looks at the charges there is no cheque of Ksh.62,988 only a cheque of Ksh.28,000 issued by Jajit Flora.** No one knows the cheques was cashed and who cashed it.

He had his bank statements showing he paid for the money. The bank statements is in court (DEX 1)

### **DW1 CROSS EXAMINED BY KOECH**

25. He stated that he was the one who handled Patrick's case and Ksh.28,200 was due as per computation by the Labor officer. He attended the meeting but he did not have the Minutes but he had the Certificate issued. The cheque was issued but

he did not know how it got lost. He stated that through his salary deductions he paid the amount. It was deducted from his account and Patrick came to his office and the amount was given to him. It was the police who told the General Secretary that the money be deducted from the account. The agreement came about because he was accused of not having done the computation at labour correctly. He signed the

agreement but he did not pay. It was to be deducted from his salary but by then he was not employed. He filed case 1178/2018 in the labour court. He stated that there was no grudge between him and Patrick. He said that he never took his identity card and stayed with if for a month. He also stated that Patrick and Dubandwa are related and they fixed him.

### **JUDGMENT OF THE COURT.**

**26.** On 17<sup>th</sup> January 2023 Hon. Gilbert Shikwe (PM) delivered a Judgment and stated as follows: -

***My analysis and observation of the testamentary and documentary evidence on record and the law has led me to the conclusion that the prosecution have successfully discharged their burden of proof in the case that they preferred against the accused person save for the amount which is Kes. 28,204/-- Consequently, I find the accused person guilty of the charge of stealing by agent contrary to section 283(b) of the Penal code. He is convicted***

***accordingly under section 215 of the Criminal Procedure Code.***

**PETITION OF APPEAL**

27. On 2<sup>nd</sup> February 2024 the Jairus Katere Shiamala the

Appellant herein filed a Petition of Appeal and stated as follows:

1. The Learned Trial Magistrate erred in law and fact by failing to make a finding that the charge sheet dated 27/7/2018 was fatally defective, as the Appellant was not an agent of the complainant by the meaning of the law, as the Appellant an employee of the Kenya National Private Security Workers Union pursuant to provisions of the Employment Act, 2007.
2. The Learned Trial Magistrate erred in law and in fact by failing to make a finding that whole sum of Kshs. 62,988,10 as contained in the charge sheet was not proven beyond reasonable doubt by the prosecution.
3. The learned trial Magistrate erred in law and fact by failing to find that the amount claimed to have been stolen was not proven beyond reasonable doubt as per the law.

## **28. PRAYERS BY THE APPELLANT**

- (a) The appeal be allowed
- (b) The conviction be quashed
- (c) The sentence be set aside.
- (d) The sum of Kshs. 20,000/- paid as court fine, be refunded to the Appellant.

## **29. APPELLANT'S SUBMISSIONS**

1. The Appellant worked as a dispute officer for Kenya National Security Workers Union. On 20<sup>th</sup> February 2016, he collected a certificate of service and two copies of cheque of Kshs, 28,214 and Kshs. 42,200/- from the Labour Officer at Nyayo house. The cheques were crossed in nature issued by Jajit Flora for the benefit of Mr. Patrick Shikuri Mamusende (PW1) and Mr. George Akaka (deceased) who had been paid for an out of court settlement of an employment dispute.
2. The Appellant handed Mr. George Akaka (deceased) who was present at the Labour office his Certificate of Service and his cheque of Kshs, 42,200/- PW I was absent at the labour office which forced the accused to go with his cheque and certificate to the union offices. PW1 showed up to

collect his cheque in the month of July 2016 this being after the lapse of over 4 months

3. The Appellant tried to locate the cheque but was unable to find the same. It was his explanation that due to change of desks the cheque got lost/misplaced. PW1 opted to report the matter to his boss who was the General Secretary (PW3) who advised the matter to be reported to the police station.
4. The Appellant and PW1 tried to resolve the issue of the lost cheques of Kshs. 28,214/at the police station. The police never investigated to find out if the cheque was cashed. He and PW 3 agreed that the amount be deducted from the Appellants salary after being advised by the police that the amount in question was a small sum of money that could be settled without going into police investigations that could cost more than the amount in dispute.
5. On 4 October 2016, the amount was deducted from the Appellant salary and paid to PW 1. The secretary general PW 3 later claimed that the Appellant had done wrong computation of the award at the labour offices. He demanded that more money

should be added to PW1 and Mr. George Akaka. The tabulation error was blamed on the Appellant as such the employer Jajir Flora was exempted from the default that resulted from the calculations.

6. PW 3 made fresh calculation of the terminal benefits and insisted that the accused personally bear the payment of the extra benefits having been blamed for erroneous calculation. PW 3 insisted that PW 1 and Mr. George Akaka (deceased) be added on top of earlier paid amounts by the employer Kshs. 33,000/- and Kshs. 34,371/ respectively. The Appellant was instructed by PW 3 (his boss) to enter an agreement committing himself to payment of Kshs. 2,500/- for 13 months for payment of the extra amount to PW1 and Mr. George Akaka. The agreement was entered on 27<sup>th</sup> October 2016 annexute MF1P-3.
7. In the month of November 2016, the Appellant was transferred to Kisumu to act as the organizer. He declined the transfer and opted to resign. He demanded his final dues which he was never paid. He left his employment and was unsuccessful at securing another job.
8. The accused decided to register a Trade Union which triggered this case. He also filed a case at

the Employment Court against Kenya national security workers union.

30. **ANALYSIS OF THE ISSUE**

**Whether the Trial Court erred in law and fact by failing to find that the charge sheet was fatally defective.**

1. The Appellant was charged with theft by agent contrary to **Section 283(B)** of the Penal Code. He was not an agent of PW1 but an employee of PW3 who worked as Industrial Relations Officer. It is the Appellants case that there was no agency relationship between him and PW1.
2. The Appellant believes that he was supposed to be charged under Section 281 of the penal code which provides for the offence of stealing by clerks or servants. It provides;-

***"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".***

31. In the case of **Kingori & 9 others vs. Republic (Criminal Appeal 8 & 9 of 2019)**

**(Consolidated) (2024) KEHC 7959 (KLR)**

Rhoda Rutto J. held at paragraph 24

32. Whether the trial court erred in evaluation of evidence and failing to find that theft was never proven.

33. PW1 testified that the cheque was for Kshs. 28,386/-. The cheque got lost/misplaced and the loss was recorded at the Police Station. The cheque was written in the names of PW1. The Appellant never benefited from the cheque. He agreed to pay the amount considering it was a small amount and it could be more expensive for investigation to be carried out by the Police.

34. It is the Appellant case that:-

i. The Appellant/Accused bank statement produced in court (DEX) shows the cheque was never cashed in by the accused/appellant in his account.

ii. No police investigation was carried out that linked/blame the accused/appellant for personally benefitting from the cheque.

iii. The prosecution failed to adduce any evidence or exhibit from the bank that could show that

the accused/appellant presented the cheque to be cashed for his personal benefit.

- iv. PW I never denied having been paid in cash Kshs. 28,386/ by PW3 from the accused salary towards covering the loss of the cheque.
- v. PW4 (Police Constable) never testified on any allegation of theft by the accused/appellant.
- vi. No report was presented showing the cheque was ever cashed out. A crossed cheque cannot be banked by a person whose name is not written on the face of the cheque.
- vii. The former Employer of PW1, Jajit Flora never testified if the cheque was ever banked.
- viii The prosecution never gave reasons why Jajit Flora was never advised to re-issue a new cheque to  
PW1.

35. The particulars of the charge sheet show that the accused is said to have stolen a cheque of Kshs. 62,988.10%. The evidence is that the cheque was for Kshs. 28,386/ and the money in dispute was wholly paid.

36. The case then turns on the agreement and not the amount of the cheque issued to PW1. The accused/appellant agreed to pay PW1 and George Akuku an extra Kshs. 33,000/- and Kshs, 34,781/-. This amount as supposed to be paid by Jajit Flora who was the employer

37. In the case of **Ahamad Abolfathi Mahammed & another**

**vs. Republic [2018] KECA 743(KLR)** while referring to the case of **Teper vs. R [1952] ALL ER 480 and Musoke vs. [1958]EA 715 and In Dhalay Sing vs. Cr. App No. 10 of 1997**, the court reiterated the principle as follows;-

***“For, our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not ben proved beyond any reasonable doubt and the accused is entitled to acquittal.”***

38. At the time of writing judgment, the Respondent did not file written submissions.

### **ANALYSIS & DETERMINATION**

39. The Court considered pleadings Trial court record and submissions filed and the issues for determination are;

- a) Whether the Appellant was convicted and sentenced on a defective charge sheet?
- b) The Amount enumerated as being stolen was not proved beyond reasonable doubt.

40. In **CRIMINAL APPEAL NO. 27 OF 2018 BENARD OMBUNA vs REPUBLIC VISRAM, KARANJA & KOOME, JJ.A** stated as follows;

*It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defense. The converse would prejudice an accused person's right to a fair trial contrary to Article 50(2)*

*(b) of the Constitution. This is the rationale behind Section*

*134 of the Criminal Procedure Code which stipulates:*

*"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the*

**accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

41. The Appellant was charged with theft by agent contrary to **Section 283(b) of the Penal Code**. He was not an agent of PW1 but an employee of PW3 who worked as Industrial Relations Officer. The Statement of offence was/is stealing by agent contrary to **Section 283 (b) of Penal Code** Particulars of offence on 9/9/2015 & 27/10/2016 at the Kenya National Private Security Workers’ Union at Hurlingham off Argwings Kodhek Road in Nairobi County being an agent of Patrick Shikuri Namusende stole Ksh 62,988.10/- the property of Patrick Shikuri Namusende which was entrusted to him by his employer Jajit Flora to pay Patrick Shikuri Namusende.
42. The evidence on record adduced by PW1 Complainant Patrick Shikuri Namusende; he was terminated by employer, he sought help from the Accused person, who summoned his employer, she came to Accused’s offices and , PW1 learnt later,

he was paid vide cheque which was in possession of Accused person.

43. From these facts alone that were uncontested, the Accused/Appellant received from PW1's employer Jajit Flora a cheque of Ksh 25,386/-. As such the Accused received PW1's payment as his agent , to pass the payment to him. I find no defect in the charge at all and reflects the transaction that deprived the Complainant his dues which amounted to theft as defined under Section 275 Penal Code and stealing by agent contrary to Section 283 of the Penal Code .
44. Consequently, if there was a defect it was curable under **Section 382 of the Criminal Procedure Code** which provides in part:

***“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under***

***this Code, unless the error, omission or irregularity has occasioned a failure of justice:...***

45. On whether the amount of Ksh 62,988/- enumerated as being stolen was or not proved beyond reasonable doubt; the Trial Court Record reflects and confirms that the Appellant handed Mr. George Akaka (deceased) his cheque of Kshs, 42,200/- PW I was absent at the labour office which forced the accused to go with his cheque and certificate to the Union offices. PW1 showed up to collect his cheque in the month of July 2016 this being after the lapse of over 4 months. The Appellant tried to locate the cheque but was unable to find the same. It was his explanation that due to change of desks the cheque got lost/misplaced. PW1 opted to report the matter to his boss who was the General Secretary (PW3) who advised the matter to be reported to the police station. The Appellant and PW1 tried to resolve the issue of the lost cheques of Kshs. 28,214/at the police station. These facts confirm that the Accused/Appellant was responsible ONLY for the amount in the cheque given to him by PW1'employer of **Ksh 28,214/-** to pay PW1. The

fact of the cheque being lost misplaced destroyed does not exonerate the Appellant from not paying PW1 the amount, in the absence of which it amounted to theft.

46. On 4<sup>th</sup> October 2016, the Secretary General PW 3 later claimed that the Appellant had done wrong computation of the award at the labour offices. He demanded that more money should be added to PW1 and Mr. George Akaka. The tabulation error was blamed on the Appellant as such the employer Jajit Flora was exempted from the default that resulted from the calculations.
47. The Kenya National Private Security Workers' Union worked for and with employees to have their dues paid by employers. Therefore, if tabulation by Appellant was wrong and PW3 corrected the said amount, the amount ought to have been paid by the employer of PW1 Jajit Flora and not the Appellant. The Appellant is held responsible and liable for only what the employer paid him on behalf of PW1 Ksh 28,214/-, the balance of which ought not to have been deducted from his salary over and above Ksh 28,214/-.

48. The Trial court judgment of 17/1/2023 reads in part;

**the prosecution have successfully discharged their burden of proof in the case that they preferred against the accused person save for the amount which is Kes. 28,204/--**

### **DISPOSITION**

- 1.The Trial Court rightly found theft of Ksh 28,204/-- only anything over and above deducted from the Appellant's salary as shown by payslips produced during trial in his defense ought and shall be refunded to him by PW1 PW3 & Employer Jajit Flora.**
- 2.The Appeal is dismissed with no orders to Costs**
- 3.Trial Court file returned to Trial Court.**

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN CRIMINAL DIVISION OF HIGH COURT AT NAIROBI THIS 25/11/2025 VIRTUALLY /PHYSICALLY.**

**M.W. MUIGAI  
JUDGE**