Maronge v Republic (Criminal Appeal E016 of 2025)
[2026] KEHC 1115 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E016 OF 2025

CW GITHUA, J

FEBRUARY 5, 2026

BETWEEN

ESTHER WANGECHI MARONGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon C. Ndumia in Criminal Case No. E016 of 2024 delivered on 9th January 2025 at the Senior Principal Magistrate's court at Kangema)

JUDGMENT

1. The appellant, Esther Wangechi Maronge was charged jointly with another with the offence of stealing by servant Contrary to Section 281 of the Penal Code in Kangema Senior Principal Magistrate's Court Criminal Case No. E016 of 2024.

2. The particulars alleged that on diverse dates between 1st September and 9th December 2023 at Kiria-ini Sub-Location, Kiru Location in Mathioya Sub-County, jointly with others not before the court, the appellant and her accomplice stole Kshs.308,155 the property of Central Supermarket which came into their possession in the course of their employment.

3. After a full trial, the appellant and her co-accused were convicted and sentenced to two years imprisonment.

   The appellant was dissatisfied with her conviction and sentence and separately filed the instant appeal.

4. In her petition of appeal dated 12th February 2025, the appellant advanced six grounds of appeal in which she principally faulted the learned trial magistrate for having failed to properly evaluate the evidence adduced by the prosecution which in her view was contradictory and incredible and was insufficient to prove the charges preferred against her beyond reasonable doubt.

5. The appellant also challenged her sentence contending that when passing sentence, the learned trial magistrate erred by failing to consider the pre-sentence report and her plea in mitigation. She also complained that the sentence was excessive in the circumstances of her case.

   She prayed that her conviction and sentence be set aside or in the alternative, the sentence be substituted with a lenient one.

6. This being a first appeal to this court, it is an appeal on both facts and the law. The duty of a first appellate court is now well settled. It requires this court to exhaustively analyse the evidence presented before the trial court to arrive at its own independent conclusion regarding the soundness or otherwise of the appellant's conviction and sentence bearing in mind that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses and give allowance for that disadvantage – See: Okeno V Republic [1972] EA 32.

7. The record shows that in support of its case, the prosecution called a total of eight witnesses. Briefly, the prosecution case was that the appellant was employed in the complainant Supermarket (hereinafter the complainant) as a Supervisor. It was part of her duty to approve customer refunds and once refunds were approved, they would be forwarded to the cashier for payment to the affected customer.

8. According to the evidence of PW5 and PW1, the complainant's manager and director respectively, refunds were only allowed if the merchandize purchased was out of stock. PW5 recalled that on 8th December 2023, in the course of his duties, he detected a fraud involving among other items, the purchase of a bag of sugar made by PW2.

   The records showed that a refund of Kshs.8,700 had been fraudulently paid to PW2. He also identified another anomaly regarding an alleged refund of Kshs.3,050 to PW3, Moses Mukuna.

9. . PW5 recalled that upon contacting PW2 and PW3, they denied having received any refund as alleged which denial they maintained in their respective testimonies during the trial. PW5 then reported his findings to PW1 who in turn ordered him to undertake an internal audit of the supermarket's accounts which he did.

10. After PW5's report was submitted to PW1, he reported the matter to PW8, P.C. Calvin Otieno who was wrongly described in the trial court's proceedings as PW6. PW8 commenced his investigations after which he charged the appellant and her co-accused with the offence subject of their conviction.

11. When placed on her defence, the appellant chose to give an unsworn statement and did not call any witness. She admitted having been the complainant's employee at the material time but denied having committed the offence as alleged. She insinuated that the charge was a fabrication by PW5 after she refused to have an intimate secret relationship with him.

12. Having carefully considered the grounds of appeal, the evidence on record and the written rival submissions filed on behalf of the parties, I find that the only issue that arises for my determination is whether the appellant was properly convicted and if she was, whether the sentence meted out by the trial court was unlawful or manifestly excessive.

13. It is a cardinal principle of criminal law that all criminal offences must be proved beyond any reasonable doubt. The rationale underpinning this principle is the need to protect and safeguard an accused person's constitutional right of being presumed innocent until proved guilty.

14. What constitutes proof beyond reasonable doubt was defined by Lord Denning in Miller V Ministry of Pensions [1947] 2ALL ER, 372 as follows;

> " ....That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice"

15. The offence of stealing by servant is created in Section 281 of the Penal Code which is in the following terms;

> " 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."

16. On the other hand, stealing is defined in Section 268 (i) of the Penal Code as follows:

> " 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 "

17. Section 268 (2) proceeds to enumerate the circumstances in which fraudulent intention can be imputed. A reading of Section 281 as read with section 268 of the Penal Code leaves no doubt that to establish the offence of stealing by servant, the prosecution must prove beyond any reasonable doubt the following key ingredients of the offence; These are;

    (i) That the accused was an employee of the complainant.

    (ii) That the accused dishonestly and fraudulently took property belonging to the employer.

    (iii) That the property came into the accused's possession in the course of employment.

18. Regarding proof of the first element, the prosecution adduced sufficient evidence to prove that the appellant was at the material time an employee of the complainant. This was not disputed by the appellant. The appellant in fact admitted this fact in her defence.

19. On whether the appellant stole Ksh.308,155 from her employer, the prosecution relied on an audit report prepared by PW5 and confirmed by PW4 which in their view established that between September and December 2023, the supermarket had lost the above amount of money allegedly through a fraudulent refund scheme initiated by the appellant.

20. A perusal of the audit report which was produced as P Exhbt 1(a) – (e) shows that it was not dated nor signed. It only had a stamp embossed by an accounting firm. Secondly, the report only contained details of goods purchased, cost of those goods, date they were bought and identity of the cashier and supervisor. The report does not show how the complainant lost the money in question or that the appellant was responsible for that loss.

21. In his evidence under cross examination, PW4, the External Auditor testified that the report revealed a variance of Kshs.308,155. He did not explain how or in which way the variance had come about. PW5

in cross examination by the appellant insinuated that the variance was caused by price fluctuations. This is what he said;

> "....My calculations were correct. The variances would be due to fluctuation of pricing ....prices fluctuate from time to time ....."

22. Although the prosecution availed two receipts and forensic evidence proving that the appellant approved refunds of Kshs.8,700 and Kshs.3050 in favour of PW2 and PW3 respectively, no evidence at all was adduced by the prosecution to prove that the appellant unlawfully and fraudulently converted the money subject of the refunds to her use without the knowledge or consent of her employer.

23. In my view, in order to prove the charge preferred against the appellant to the required standard, the prosecution needed to do more than merely establishing that the appellant had wrongly approved two refunds. The prosecution should have gone further to prove through cogent and credible evidence that the appellant went further and fraudulently and permanently deprived her employer not only of the money wrongly approved for refunds but the entire sum stated in the particulars supporting the charge. No such evidence was availed to the trial court.

24. It is also important to note that the complaint in this case was solely based on a claim that there was a loss or a shortfall discovered after auditing of the complainant's books of accounts.

    PW4 and PW5 did not in their evidence point to any false entries in the report. In my opinion, failure to balance books of account cannot be exclusively attributed to theft as it can be caused by various other factors like price fluctuations as indicated by PW5 or poor record keeping or book keeping methods.

25. . In view of the foregoing, I have come to the conclusion that the evidence adduced before the trial court was not sufficient to prove the charges preferred against the appellant beyond any reasonable doubt. There were yawning gaps in the prosecution case which created reasonable doubts in the prosecution case which doubts, as required by the law, should have been resolved in favour of the appellant.

26. . Consequently, it is my finding that the appellant was not properly convicted. This appeal is thus merited and it is hereby allowed. The appellant's conviction is accordingly quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 5TH DAY OF FEBRUARY 2026.

HON. C. W. GITHUA

JUDGE

In the presence of;

The Appellant.

Mr. Gachimu for the Appellant

Ms. Susan Waiganjo, Court Assistant

No Appearance for the Respondent.