

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ITEN**  
**CRIMINAL APPEAL NO. E044 OF 2024**

**DISMAS KIPKOECH KIPCHUMBA .....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. V. Karanja  
(PM), in Iten Senior Principal Magistrates Court Criminal Case No. E963  
of 2023)*

**JUDGMENT**

1. This Appeal arises from the conviction and sentence of the Appellant in **Iten Senior Principal Magistrates Court Criminal Case No. E963 of 2023**.
2. The Appellant with another not before Court was charged with the offence of **Stealing** contrary to **Section 268** as read with **Section 275** of the **Penal Code**. The particulars of the offence were that on diverse dates between 24<sup>th</sup> and 29<sup>th</sup> day of July, 2023 at Iten Township in Keiyo North Sub-County within Elgeyo Marakwet County stole cash Kshs. 331,090/= the property of one Judith Jepkoech Kosgei.
3. The Appellant pleaded not guilty to the charge and the case went to full trial in which the prosecution called three (3) witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defense under **Section 210 of the Criminal Procedure Code**. The Appellant opted to give a sworn statement of defense and called

one witness. By judgment delivered on 05<sup>th</sup> September 2024, the Appellant was convicted and sentenced to serve three (3) years imprisonment.

4. Being dissatisfied with the decision of the trial Court, the Appellant instituted this appeal on 20<sup>th</sup> September 2024, against both conviction and sentence on five grounds reproduced verbatim as follows: -

**1) The learned trial Magistrate erred in law and fact by failing to consider the evidence of the Appellant on merit.**

**2) The learned trial Magistrate erred in law and fact by failing to consider the nature offence the circumstances under which the Appellant was operating under at the time offence occurred.**

**3) The learned trial Magistrate erred in law and fact by failing to consider the fact the prosecution had not proved their case beyond any reasonable doubt.**

**4) The learned trial Magistrate erred in law and fact by failing to consider the fact that the prosecution evidences were contradicting itself.**

**5) The learned trial Magistrate erred in law and fact by convicting the Appellant and by sentencing him to the maximum sentence of 3 years' imprisonment and which is too harsh for the Appellant considering the facts of the matter.**

### **Prosecution Evidence**

5. **PW1** was **Judith Kosgei** the complainant. She testified that she had employed the Appellant as her agent in her Mpesa Outlet. She stated that between 24-29<sup>th</sup> July she did her accounting and found discrepancies. That the Appellant told her that someone had taken some cash and he requested her to give him one week.
6. She stated that she gave him until 31<sup>st</sup> July 2023 and when she went back to the shop, she found that the Appellant was “Mteja.” She further testified that she checked her statement and did not see any cash for Kshs. 7,000/=. That the Appellant had deposited Kshs. 100,000/= in his account on 27<sup>th</sup> July 2023, on 28<sup>th</sup> July 2023 he deposited Kshs. 50,100/= and a further Kshs. 10,050/=, on 29<sup>th</sup> July 2023 he deposited Kshs. 1,000/= and a further Kshs. 49,000/=. She availed a statement which was marked as PMFI-1.
7. She added that the Appellant also got an Airtel line and deposited Kshs. 15,000/= on 29<sup>th</sup> July 2023 and that he also transferred Kshs.700 into his account. She stated that in his phone on 26<sup>th</sup> July 2023 he sent Kshs. 55,000/=, on 27<sup>th</sup> July 2023, he deposited Kshs. 10,000/=, on 24<sup>th</sup> July /2023 he deposited Kshs. 5,000/= and a Kshs. 35,000/=. She then availed the Mpesa statement which was marked PMFI-3. That she then reported the matter to the police. She testified that the Appellant stole a total of Kshs. 331,090/= from her business. She further stated that the Appellant disappeared but he was later arrested.
8. In cross-examination PW1 stated that the Appellant deposited her money in his accounts, that he had her pin and so he could manipulate the system, that

he was not required to withdraw the money in the counter but was to use only the machine and he was also not required to transfer money on behalf of a client.

**9. PW2 was Becky Kosgei**, she testified that she knows the Appellant who was an employee to PW1. She told Court that PW1 is her sister. She stated that on 31<sup>st</sup> July 2023 at around 8:00 am PW1 called her and informed her that the Appellant was missing from his work place and that he was unreachable on call. She then accompanied her sister to report the matter.

**10. PW3 was No.74701 Sgt. Peter Kosgei**, the investigating officer. He testified that on 31<sup>st</sup> July 2023 he was instructed to investigate the case of the complainant who had reported that her Mpesa agent assistant had disappeared when she reported about her money which was missing from her KCB Mtaani and Mpesa. He told the Court that he recorded the statement and obtained a statement from Mpesa and KCB Mtaani and found that a sum of Kshs. 331,970/= was missing. He then arrested the Appellant who returned on 8<sup>th</sup> September 2023 and charged him with the offence. He produced the statements as Pexh 1 (a), 1 and 2 (bundle). In cross-examination, PW3 stated that he did not know the total sum, that he did not do the calculations but investigations.

### **Defence Evidence**

**11. The Appellant testified as DW1.** He gave a sworn statement of defense. He testified that he was employed as the complainant's Agent in her Mpesa shop and that they did not sign any agreement and therefore he was a stranger to her. He testified that there was a movement offer from Mpesa float to KCB account for cash flow of not less than Kshs. 30 million.

12. That in May 2023 when he had a deficit, there was a network downtime that prolonged to June 2023 and on 20<sup>th</sup> June 2023 when he generated a bank statement from 1<sup>st</sup> May 2023 to 10<sup>th</sup> June 2023. That when he started reconciling, he successfully recovered Ks. 15, 000/- traced to one Sylvia Kiptoo. On 24<sup>th</sup> July 2023, the complainant assessed the work and realized there was a deficit of Kshs. 290,000/=. He told her to wait until 31<sup>st</sup> July 2023 he produces the money but because he was depressed, he did not report to work and on 8<sup>th</sup> September 2023 when his sister Mercy called him.

13. He then went to Iten Police Station and told the OCS the whole story. The OCS advised him to go and discuss the matter with Judy. And on 22<sup>th</sup> September 2023 when they agreed to meet at the police Station, he was charged. He produced the following exhibits; a screenshot message as DExh1, Statement DExh2, screenshot of message as DExh3 and Bank Statement DExh4. In cross-examination DW1 conceded that the money got lost under his care.

14. DW2 was **Pauline Cheron**, the Appellant's mother. She testified that the complainant came and informed her that the Appellant had disappeared and that money was missing. She stated that they attempted to settle the matter and that she informed the complainant when the Appellant resurfaced. She told the Court that she paid the complainant Kshs. 20,000/= and that she was later informed that Kshs. 290,000/= had been stolen.

### **Submissions**

15. The appeal was canvassed by way of written submissions which were duly filed.

### Appellant's Submissions

16. On the ground on whether the prosecution proved its case beyond reasonable doubt. Counsel for the Appellant cited **Section 268** of the **Penal Code** and submitted that the prosecution failed to establish a case beyond reasonable doubt and majorly relied on verbal evidence that was highly unsupported by documentary proof. That the documentary proof is inconsistent with the testimonies of the prosecution witness. Counsel placed reliance on the case of **JMN v Republic [2022] KEHC 279 (KLR)** and the case of **Republic v Patrick Ong'au Okioma [2021] eKLR**.
17. Counsel urged that the prosecution evidence inconsistent and was unsupported by evidence provided by their witnesses and that the court mainly relied on hearsay evidence. Counsel submitted that PW1, the complainant testified that she had lost a total of Kshs. 331,090/= which contradicts the statements provided in court from KCB Bank and that the said statements produced by the complainant vary from one document to another on the exact amount that was missing. That this then raises questions on whether there was an error in the date of the rubber stamp that was used in some of the statements produced in support of the prosecution case. That this raises the question of the authenticity of the said documents. Counsel placed reliance on the case of **Philip Nzaka vs. Republic [2016] eKLR**.
18. Counsel further submitted that the prosecution ought to have also produced an independent witness to corroborate on the exact amount that went missing under the care of the Appellant. He placed reliance on the case of **Moses Mutahi Mugo vs. Republic [2022] eKLR** and submitted that the prosecution ought to have called an independent witness, an expert witness

from KCB Mtaani and Mpesa to corroborate the exact amount that was missing and if really the Appellant had deposited the money into his account. Counsel placed reliance on the case of **Juma Charo Ali vs. Republic [2021] eKLR** in this regard.

**19.**Counsel urged that because the testimonies of the prosecution witnesses contradict the documentary evidence produced in court, then the prosecution evidence remains as circumstantial without any documentary evidence to back their accusations against the Appellant. Counsel argued that from the documents produced by the prosecution, both from KCB Mtaani and the Mpesa Statements, there is no evidence that the Appellant transferred Kshs. 100,000/= to his account as testified by PW.

**20.**Counsel added that PW1 and the PW3, the investigating officer also gave contradicting testimonies on the exact amount that was missing; that PW1 testified that KShs. 331,090/= was missing while PW3 testified that Kshs. 331,970/= was missing. Counsel urged the Court to note that from the documents produced by the prosecution as exhibits in support of their case the amount missing was Kshs. 240,850/= which excluded Kshs. 90,240/= that was clarified and has been corroborated by the statements that it belonged to one Mark Kiplagat and that the Appellant did not withdraw that amount. Counsel thus urged that the case was not proved beyond reasonable doubt.

**21.**With regard to the sentence, Counsel urged that the sentence imposed by the trial Court is harsh and the same ought to be set aside by this Honorable Court. He argued that the trial Court failed to consider the Appellant's

mitigation wherein he expressed his will to enter into an agreement with the Complainant in order to pay the Complainant. Counsel submitted that the trial Magistrate ought to have considered an alternative means of sentencing given the willingness of the Appellant to pay back the complainant the amount lost under his care.

22. He placed reliance on the case of **Ndonye vs. Republic [2024] eKLR** and urged that in the interest of justice and mitigation by the Appellant, the Court should have considered a reasonable fine or a non-custodial sentence as the Appellant was willing to pay back the amount that went missing under his care.

### **Respondent's Submissions**

23. On whether the prosecution proved its case beyond reasonable doubt, Prosecution Counsel cited **Section 268(1)** of the **Penal Code** and submitted that in this case the Appellant was the complainant's employee as a KCB Bank Agent, money was then lost and that from the evidence and the KCB and Mpesa Statements, the Appellant transferred the money to his account without authority.

24. Counsel argued that in his sworn defense, the Appellant admitted that he was employed by the complainant, that he admitted that on 24/07/2023, Judy assessed the work and realized that there was a deficit of Kshs. 290,000/= and that he failed to report to work after that. Counsel added that the Appellant also admitted on cross-examination that money got lost under his care. Counsel submitted that the Appellant without any claim of right, transferred the lost money, which was something capable of being stolen,

from the complaint's agent account to his account without any claim of right.

25. On whether the Magistrate failed to consider the Appellant's evidence, Counsel submitted that under paragraph 4 of the judgment delivered on 5<sup>th</sup> September 2024, the trial Court expressly pronounced itself that it finds the Appellant's defense is a mere denial and untrustworthy.

26. On whether there were material and inconsistencies and contradictions in the prosecution case. Counsel placed reliance on case **MW vs. Republic [2019] eKLR** and submitted that evidence by the witnesses was consistent to the date of the crime, the fact the Appellant was employed by the complainant, and that money was stolen. Counsel questioned if at all there were any inconsistencies, then they cannot necessarily shake the prosecution's evidence. Counsel observed that it has been numerous held that the Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

27. Regarding the sentence Counsel placed reliance on the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**. Counsel observed that **Section 275** of the **Penal Code** provides that for general punishment for theft, punishment provided is imprisonment for a period of three (3) years. Counsel submitted that in this case, the Court sentenced the Appellant to 3 years' imprisonment after considering the mitigation and the offence and maintained that the sentence is proper and within the parameters of the law.

### **Analysis & Determination**

28. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (**See Okeno vs. Republic [1972] E.A 32**)

**Issues for determination**

a) **Whether the Prosecution proved its case beyond reasonable doubt.**

b) **Whether the sentence was harsh and excessive.**

29. The Appellant challenged the totality of the prosecution case and contended that the offence of stealing was not proved beyond reasonable doubt.

30. Section 268 of the **Penal Code** defines the offence of stealing which simply put is defined in the **Black's Law Dictionary** 8<sup>th</sup> Edition as:

**“To take (personal property) illegally with the intent to keep it unlawfully”.**

31. The standard of proof in a criminal trial cannot be overemphasized. It is beyond reasonable doubt and as Lord Denning in the famous case of **Miller v Minister of Pensions [1942] AC** thus: -

**“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man 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.”**

32. In the instant case, I note that the prosecution evidence was not only not substantially contradicted in any meaningful way by the Appellant in the cross examination of the prosecution witnesses, but the material particulars of the said evidence was actually very well corroborated and confirmed by the Appellant himself in his defence as can be gleaned from the herein summary of the evidence that was adduced before the trial court. I therefore find no merit on the ground that the Prosecution failed to prove its case beyond reasonable doubt

33. Further, in light of the above, I also find no reason to fault the finding of the trial court that the Appellant’s defence then amounted to a mere denial. Indeed, the Appellant’s Counsel buttresses this position further in his submissions by urging that the sentence meted out by the trial court was harsh because the Appellant was ready to pay back to the complainant the money. All these only go towards negating the ground that the trial court did not consider the Appellant’s defence

34. In the circumstances, I find that the Appellant's appeal against conviction has no legs to stand on and the same must therefore fall. The same therefore lacks merit and the same is accordingly dismissed.

35. On the appeal against sentence, the applicable principles in considering sentence on appeal were restated by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR, (Supra)** in the following terms: -

**“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”**

36. The Appellant herein was sentenced to serve three (3) years imprisonment. **Section 275** of the **Penal code** provides for a sentence of imprisonment for three years. This sentence is not a mandatory sentence however. In considering the fact that the Appellant expressed in mitigation

that he was willing to pay back the money to the complainant and that in actual fact, the evidence on record reflects that the Appellant's mother had already started paying back the money on his behalf.

**37.**For these reasons, it is my considered opinion that the sentence meted out ought to have been more lenient as opposed to the maximum allowable sentence that the trial court meted out on the Appellant. In the circumstances, the court does find this to be an appropriate case where it ought to interfere with the sentence. In this regard, the sentence of three (3) years imprisonment imposed by the trial court is now hereby commuted to the period that has already been served by the Appellant. If in custody, the Appellant is therefore to be released forthwith unless otherwise lawfully held. It is so ordered.

**38.**Right of Appeal 14 days

**Read dated and Signed at ELDORET on 26<sup>th</sup> February 2026**

**E. OMINDE**

**JUDGE**