



REPUBLIC OF KENYA



**KENYA LAW**  
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**Samoei v Republic (Criminal Appeal E033 of 2024)  
[2025] KEHC 11593 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E033 OF 2024**

**EN MAINA, J  
JULY 31, 2025**

**BETWEEN**

**HILLARY SAMOEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment by Hon. B. Ojoo (CM) in Mavoko Chief Magistrate's Court in Cr. case No. E573 of 2023 Delivered on 30th April, 2024)*

**JUDGMENT**

1. The Appellant herein Hillary Samoei was charged with an offence of stealing by servant contrary to Section 281 of the *Penal Code*.
2. The particulars of the offence being that on diverse dates between day of may 2023 and 14<sup>th</sup> May 2023 at Locomotive section of Nairobi terminus in Mavoko sub county within Machakos County being a servant to Kenya railways Corporation stole seventeen hydrostatic magnetic oil filters valued at kshs 1,320, 543 the property of Kenya railways corporation which came into his possession by virtue of his employment.
3. After hearing and analyzing the testimonies of the ten prosecution witnesses and also the testimony of the appellant, the trial Magistrate found the appellant guilty on the charge of stealing by servant, convicted him and sentenced him to imprisonment for 5 years.

**Appeal :**

4. Aggrieved by the Judgment the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;



1. That the Learned Magistrate erred in matters of law and fact by convicting the appellant in a case where identification of the perpetrator was not free from possible error.
  2. That the Learned Magistrate erred in law and fact by convicting the appellant in a matter where the electronic evidence produced by the prosecution was unreliable in matters of visibility.
  3. That the Learned Magistrate erred in law and fact in by convicting the appellant in a case where the evidence was contradicting, doubtful and full of glaring gaps and inconsistencies yet there was no corroboration of evidence.
  4. That the Learned Magistrate erred in law and fact in by not considering the appellants firm submissions and defence
  5. That the Learned Magistrate erred in law and in fact by convicting the appellant in a matter that investigations were inept in matters relating to documents tendered as evidence i.e the handwriting was extracted from documents which attesting witness from China Road and Bridge Corporation was not procured
  6. That the Learned Magistrate erred in law and in fact for not considering that the appellant was not on duty as per Kenya Railways attendance records
  7. That the Learned Trial Magistrate erred in both law and fact by convicting the appellant without considering that proper investigations were never contacted by the prosecution deficient by the findings of the facts thus the danger of convicting the appellant on the uncorroborated evidence of the complainant
  8. That the trial magistrate erred in law and in fact in convicting the appellant in a case where no exhibit was found in his possession.
  9. That whether or not in the circumstances of this case, the sentence that was meted upon the trial court was lawful and or warranted
5. The Appeal was canvassed by way of written submissions.
  6. The Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the three ingredients of the offence were proved. The ingredients being that the stealing or fraudulent conversion occurred, that the stolen items belong to the employer and that the offender is a clerk or servant.
  7. On the issue of whether the appellant was positively identified as the one who committed the offence it was submitted that the CCTV footage captured the appellant outside locomotive no 5120. He went inside the locomotive and was seen coming out with an item which he threw under the locomotive
  8. It is finally submitted that the sentence 5 years was lawful and lenient taking into consideration the value of the hydrostatic magnetic filters that were stolen.

### **Determination**

9. I have considered the Appeal, the Trial Court record and the submissions of parties on record.
10. This is a first Appeal and in the case of *Okeno v Republic* [1972] EA 32 the court stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting



evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

11. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated 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.”

12. The offence of Stealing by Servant is created in Section 281 of the [Penal Code](#). The provision states as follows:

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.

13. To establish a charge of stealing by a servant and to secure a conviction under the above section, the prosecution must prove the following:

The accused was an employee of the complainant;

The property came into the accused's possession while they were employed;

The accused dishonestly took the property, defrauding the employer;

14. Stealing is defined in Section 268 of the [Penal Code](#) as taking something capable of being stolen without claim of right, or fraudulently converting property to the use of someone other than the owner.

15. On whether the appellant was an employee of the complainant, the prosecution witnesses confirmed that the appellant was an employee of Kenya Railways Corporation. The Appellant also confirmed he works for Kenya Railways and a letter of appointment was also produced.

16. On whether the property came into the accused's possession while they were employed, PW1 testified that there was a report of incident of theft where two locomotives had been vandalized. He stated that the pumps could not be vandalized by someone with the knowledge of how the pumps work and where they are located. He also testified that when they checked the key movement book they noted that the key was accessed by the appellant who was seen at work around the workshop area when he was supposed to be off duty.

17. PW3 testified that upon retrieval of the CCTV Footage from the main operation area they were able to see the appellant outside the locomotive 5120, he went inside the locomotive and was seen coming out with an item which he threw down the locomotive.



18. The cumulative evidence by the prosecution witness was overwhelming and well connected. There was not only documentary evidence in support, but also expert evidence of the Document Examiner that perfectly linked the Appellant with the stolen items.
19. The appellant in his defence stated that he reported to work on 6<sup>th</sup> may 2023 and worked upto 12 pm, he also stated that he was on sick leave and on 17<sup>th</sup> may 2023 when he returned to work he was told of an incident of theft of hydro static magnetic oil filters.
20. From the evidence adduced, the offence of Stealing by Servant was, therefore, properly proved. The Appellant was rightly found guilty and convicted.
21. There was an allegation by the Appellant that the evidence was riddled with contradictions. This Court has carefully perused the record. Contradictions in evidence cannot be totally ruled out when parties testify the reason being that people perceive and narrate same events differently. Therefore, unless the contradictions go to the root of the matter and prejudices the accused, such are reconcilable and not fatal to the case.
22. In regard to the sentence, I note that the trial magistrate did not take into account the period the Appellant spend in custody contrary to Section 333(2) of the *Criminal Procedure Code*. So that the sentence is in conformity with the law let it be computed to run from the date of the arrest which is 17<sup>th</sup> May, 2023.
23. The Appeal is otherwise dismissed.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> JULY 2025.**

**E. N. MAINA**

**JUDGE**

In the presence of:

Ms Nyauncho for the State

Appellant virtually

Miriam – court assistant/Interpreter

