



**Omido v Republic (Criminal Appeal 35 of 2023)
[2024] KEHC 1579 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 35 OF 2023
DR KAVEDZA, J
FEBRUARY 22, 2024**

BETWEEN

CALEB OMIDO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. M. Maroro (P.M) on 16th March 2023 at Kibera Chief Magistrate's
Court Criminal Case no. 3119 of 2016 Republic vs Caleb Omido)*

JUDGMENT

1. The appellant was charged with two counts of offences. In count one he was convicted for the offence of stealing by servant convicted for the offence of stealing by servant contrary to section 268 (1) as read with section 281 of the *Penal Code*, Cap 63 Laws of Kenya. He was convicted to serve four (4) years imprisonment. However, he was acquitted on count II for the offence of offence of making a document without authority contrary to Section 357 (a) of the *Penal Code*. Being dissatisfied, he filed an appeal challenging his conviction and sentence.
2. In his appeal he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v Republic* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.



4. For the prosecution to prove the charge of theft by servant, it must establish the following: that the Appellant was an employee of the complainant, that the Appellant stole the property of the employer that came to his possession in the course of the employment, and finally that the appellant dishonestly appropriated the said property thereby depriving the employer of the same.
5. PW1, Cecil Nyawa, testified that the appellant was the principal of Hupendo School, where her child, Christopher Nyawa Uwazawa, studied in Form Four. She paid a total of Kshs. 7,500 registration fees for her son's KCSE exams in installments, with the first installment of Kshs. 3,000 via Mpesa to the principal's phone. Despite paying Kshs. 4,500 in person at the office, she didn't receive a receipt, and her son wasn't registered for exams. The principal failed to address her concerns. Consequently, her son couldn't sit for the exams in 2016. Mpesa records showed transactions to the appellant's phone.
6. PW2 testified that although appellant collected cash from parents for exam registration, he did not remit the said amounts to the school. When confronted about the issue, he admitted to the same and promised to repay the amount. However, he failed to go to work and was unreachable on phone. This was in March 2015. Subsequent investigations that were conducted revealed discrepancies. Mpesa records indicated substantial sums sent to the appellant, corroborating his allegations.
7. PW3, Carline the manager, testified that in February and March 2016, she found significant debts in the records, leading to chasing students away for unpaid fees. She confirmed discrepancies in school documents, including the appellant's number added and official numbers removed. PW3 corroborated the evidence of PW2 evidence, noting that a total of Kshs. 217,065 was unaccounted for. During this period when money went the alleged offence was committed PW 3 had fallen sick hence the appellant was running the school's administrative operations. Investigating officer PW4 confirmed the appellant's agreement to refund the money.
8. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence and he chose to give sworn evidence. He admitted being employed at Hupendo School between 2015 and 2016 where he was in charge of administration. He also admitted to collecting money from parents as directed by the manager and director. He however denied committing the offences alleged. He confirmed his mobile number as 0723xxx352 and claimed to have spent the money with authorization.
9. I have considered the record of the lower court and the submissions filed by the parties. The issue for determination is whether the appellant's conviction was proper.
10. In this appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the prosecution did not prove the case beyond reasonable doubt. In addition, the ingredients of the offence of stealing by servant were not established.
11. It is not disputed that the appellant was employed by Hupendo School as an administrator and principal. This was confirmed by PW 1 who was a parent at the school. PW1 also gave evidence that the appellant failed to register students for exams despite receiving fees, and PW2 confirmed the appellant collected cash from parents but didn't remit it to the school. PW3 corroborated discrepancies in school documents and outstanding fees. The appellant admitted to taking money but failed to refund it, as confirmed by investigating officer PW4. Mpesa records and witness accounts indicate misappropriation of funds, with the appellant altering documents and abandoning responsibilities, resulting in financial losses and student distress.



12. Section 108 of the Evidence Act Cap 80 (Laws of Kenya) provides that: -

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Further, Section 109 of the Evidence Act stipulates that: -

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

13. Notably, the appellant did not deny having been employed by Hupendo School between 2015 and 2016. His duties involved administration. In the course of his duties, the appellant collected money from parents and failed to issue receipts. Some of the money was also sent to his mobile number. The resultant loss was the sum of Kshs. 217,065/=. The appellant was directly implicated as the beneficiary. Collectively, this evidence establishes the appellant’s culpability in the theft.

14. Having critically analysed the evidence on record, this court was satisfied that the learned Trial Magistrate did not err.

15. On sentence, the appellant was sentenced to serve four (4) years imprisonment, During the sentencing proceedings the court noted that the complainant was amenable to reimbursement of the sum lost in alternative to a prison sentence. However, when the appellant was given time to repay the amount due and owing, he absconded and the sentence had to be imposed in his absence.

16. Section 281 of the Penal Code Cap 63 (Laws of Kenya) provides that:

“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.”

17. The offence the Appellant was charged with carries a maximum sentence of seven (7) years imprisonment. In the circumstances of the case, the sentence of four (4) years imprisonment was legal. In considering the appropriateness of a restitution sentence in this case, it is pertinent to observe that the appellant has exhibited a lack of willingness to provide restitution to the complainant, evidenced by his absconding. Nevertheless, I am inclined to afford the appellant a final opportunity to fulfill his obligation of restitution to the complainant in accordance with the provisions of section 178 of the Criminal Procedure Code.

18. Consequently, I substitute the sentence of four (4) years imprisonment with a sentence of probation for a period of three (3) years during which time he should compensate the complainant the sum of Kshs. 217,065/=.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF FEBRUARY 2024

D, KAVEDZA

JUDGE

In the presence of:

Appellant present in person



Ms. Ntabo present for the Respondent
Nelson Court Assistant.

