



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 149 OF 2019

FRANCIS MUTUA MUSYIMI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. J. Mwaniki (SPM) in Makueni

Senior Principal Magistrate's Court Criminal Case No. 542 of 2015 delivered on 2/8/2018).

JUDGMENT

Francis Mutua Musyimi the Appellant herein was charged with the offence of stealing contrary to section 275 of the Penal Code. The particulars were that the Appellant on the 9th day of August 2015 at Wote town in Makueni county jointly stole Kshs.160,000/= (*one hundred and sixty thousand*) the property of **Alexander Musau Kioko**.

After a full hearing, the learned trial Magistrate found the Appellant guilty and convicted him. He was sentenced to serve three (3) years imprisonment on 2nd August 2018. He filed this appeal challenging only the sentence. His submissions are based on the request for reduction of his sentence by this court. He says he is remorseful and has completely reformed.

Learned counsel for the State Mrs. Anne Gakumu submits urging the court not to interfere with the conviction and sentence as the same are lawful. She states that the Appellant is not a 1st offender and is deserving of the sentence.

Analysis and determination

As a first appeal court, I have the duty to re-analyse and re-consider the evidence and arrive my own independent conclusion. See **Okeno – vs- R 1972 E.A 32; Kiilu & Anor (2005) I KLR 174**.

The prosecution case is that the Appellant was driving lorry registration No. KBR 848G for purposes of selling and delivering of beer to customers. The business was for Pw1 **Alexander Musau Kioko**. On 9th August 2015 he was sent to deliver beer worth Kshs.160,000/= to Pw3 **James Matata Nthitu alias Ken** at Mbumbuni. He made the delivery and was paid the cash, (Kshs.160,000/=). He was to make another delivery to a customer in Kalawa.

When he returned from Mbumbuni he parked the lorry and took off without surrendering the cash. His phone went off after a while and he could not be reached. Receipts (EXB1a – c) issued to the Appellant were produced by Pw6 **No. 81439 Corporal Lawrence Owuya**. The Appellant was then arrested in Kakamega.

The Appellant in his defence denied the charge saying he delivered the beer in Mbumbuni and Kalawa as instructed by Pw1. That he worked from April – August 2015 without pay. He said he had been arrested twice.

An analysis of this evidence shows no inconsistency in the evidence of the prosecution witnesses. The Appellant does not deny being assigned a duty to sell beer. All he says is that he delivered some beer in Mbumbuni and he was arrested. He again delivered more beer in Kalawa and was arrested.

He does not say how much beer he delivered and how much he was paid for it. Pw3 confirmed having paid him Kshs.160,000/=. He never surrendered this money to Pw1 or Pw2 the depot clerk. He converted it to his own use hence the charge of theft. I find that the trial Magistrate arrived at the correct finding after analyzing the evidence.

The conviction is found to be safe. On sentence I find that the Appellant was a repeat offender for a similar offence. No single cent was

recovered from the money stolen. The reformation he has undergone is for his own well-being. I find no harshness or excess in the sentence. The upshot is that the appeal lacks merit and is dismissed.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge