



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 5 OF 2019

JOSEPH GITHINJI NGIGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Criminal Case no. 1101 of 2018 delivered on the 7<sup>th</sup> day of January, 2019 by by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant who pleaded guilty to the offence of theft contrary to section 275 of the Penal Code, and was convicted and sentenced to imprisonment for 2 years on 7/1/2019 has appealed from the sentence seeking a reduction of the sentence citing breadwinner role.

2. In his mitigation before the trial Court, the appellant had said that:

*“I took the water pump generator [subject of the theft] and sold it to pay for my wife’s hospital bills. I pray for leniency. I am remorseful”.*

3. The DPP did not oppose the appeal, and observing that the appellant had at the time of the hearing on 18/9/19 served 8 months of the 2 years sentence, urged that *“he has served a substantial portion of the sentence and he may serve the remainder of the sentence on non-custodial terms”.*

4. A pre-sentence Report by the Probation Office dated 1/10/2019, was negative, recommending that:

*“Given the negative sentiments from the victim, the local Administration and the immediate neighbours **coupled with the fact that the appellant is a vagrant with no fixed abode, his rehabilitation with the community would be difficult.** It is my opinion that this case may be dealt with otherwise.*

*Kiprono M.K*

*Probation Officer.*

*Baringo Sub-County*

*01/10/2019”.*

5. The Court is alive to need for caution in wholesale accepting the Probation Officer’s Report as counseled by the Court of Appeal in **Kyalo v. R** (2009) KLR 325 on account of lack of any testing of the report by way of cross-examination. However, when invited to submit on the Report, Counsel for the DPP left the matter to the Court and the appellant only said that he used to live at Marigat and prayed for leniency.

6. At the time of the judgment herein the appellant will have served almost 10 months of the 16 months sentence, with remission on the 24 months actual sentence.

7. In the circumstances of this case where the non-custodial community based rehabilitation is difficult on account of the appellant’s want of fixed abode, and noting that the appellant was, according to the facts which he accepted, arrested at the border town of Isibania after disappearing from his father’s home, the Court must give him benefit of doubt as to his mitigation and consider other forms of non-custodial sentence even though community-based rehabilitation be difficult.

8. It is an objective of punishment that the offender should not benefit from his criminal act and the Court may when considering a punishment seek to take away any benefit of the crime. The appellant in this case stole a water pump generator and sold it for his own purposes, which may have included the professed payment of his wife's hospital bills. A good motive is, however, no excuse of crime. See section 9 (3) of the Penal Code.

9. The Court shall take away the benefit of the proceeds of sale of the water pump generator by requiring the appellant to pay as fine in addition to the period of 10 months already served in custody a fine of Ksh.35,000/=, the stated value of the water pump generator, and in default to serve imprisonment for 6 months.

**Orders**

10. Accordingly, for the reasons set out above, the Court pursuant to section 354 (3) (b) of the Criminal Procedure Code, alters the sentence of the trial Court to an imprisonment term for the period already served together with a fine of Ksh.35,000/= and on default of payment to imprisonment term for 6 months, in terms of section 26 (3) of the Penal Code, which allows imposition of a fine in addition to an imprisonment term.

11. There shall, therefore, be an order for release of appellant upon his payment of the fine of Ksh.35,000/=.

*Order accordingly.*

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF OCTOBER 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.