



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

MISC. APPLICATION NUMBER 8 OF 2017

DANIEL PKIECH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The accused person was charged with the offence of **Stealing** contrary to **Section 275 of the Penal code**.

Particulars of the offence were that on the 7th day of September 2017 at Siyoi area within West Pokot County stole two chickens valued at Kshs 800/= the property of ANNA CHEMATUI.

The accused person was also charged with a Second Count of **Creating Disturbance Contrary to Section 95(1)(b) of the penal code**, particulars being that on the 7th Day of September 2017 created disturbance in a manner likely to cause breach of peace by threatening to cut ANNA CHEMATUI using a panga.

The accused person pleaded guilty to both counts. The facts as presented by the state are that the accused person on 3rd September 2017 confronted his mother Ann Chematui demanding cash and threatened to beat her if she did not give him the cash. He took chicken from the homestead and went to sell, he was pardoned for that incident. On 7th September 2017 he demanded for cash from his mother insisting that it should not be less than Kshs 200/=; he was apparently drunk. The mother did not give in to his demands, so he took a second chicken bringing the total value to kshs 800/= and when the mother tried to stop him he armed himself with a panga and threatened to cut her. She fled for safety and reported the matter to the police leading to investigations. No recovery was made.

The accused person agreed that the facts were correct. He was therefore convicted on his own plea of guilt.

On mitigation he told the court that he was drunk and that he has never taken any certificate but he had gone to school. He said he had also not been issued with a driving licence. He asked for forgiveness.

The Honourable trial Magistrate sentence him to 12 months imprisonment in count I and 6 months imprisonment in Count II, the sentences to run concurrently. The accused person then appealed on the following grounds:-

- 1. That the learned trial magistrate erred in law and in fact when he failed to give option of fine to the appellant.***

2. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant without taking into consideration the mitigation by the appellant.

3. That the learned trial magistrate erred in law and fact by taking into consideration whether the appellant herein understood the charges he was facing.

4. The learned Trial magistrate erred in law and fact by convicting and sentencing the appellant without taking into consideration the mitigation by the appellant.

5. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant which sentence was harsh, unlawful, unsafe and excessive in the circumstances.

Counsel for the Appellant submitted that **Section 275 of The Penal Code** provides that “**any person who steals anything capable of being stolen is guilty of a felony termed theft and liable unless owing to circumstances of the theft or nature of what is stolen may be sentenced for a period of 3 years.**” She further submitted that the value of the chicken was Kshs 800/= and that on mitigation the appellant had indicated that he took the chicken so as to enable him to get his certificates but the money was not enough. The Honourable court did not consider the circumstances of the theft and the nature of the items stolen and that the appellant was a first offender. She opined that the sentence was excessive and that the trial magistrate should have considered a deterrent sentence by putting him on probation or giving him an option of a fine. At the time of submission the appellant had already served three months of his sentence and he had sought for forgiveness from his mother and had in mitigation expressed remorse and promised not to repeat the offence if set free. They urged the court to allow the appeal on sentence.

In response counsel for the state pointed out that **Section 348 of the Criminal Procedure Code** is clear that an appellant who has pleaded guilty to an offence shall only be allowed to appeal on the sentence. The sentence provision of the Penal Code is upto three years imprisonment and trial magistrate sentenced him to one year. The circumstances that the accused committed the offence, the first time and was pardoned by his mother and went back to steal again after four days, she submitted, the sentence was lenient and should be upheld and the Appeal dismissed.

The procedure for taking plea was well set out in the case of **Adan-vs- Republic** as follows:-

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the facts or raises any question of his guilt, his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

From the record of proceedings the above procedure was followed. This then led the Trial Magistrate to sentence the accused person on his own plea of guilt.

Section 26 (3)(1) of the Penal Code states that “**A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment: Provided that -**

i. Where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;”

Section 275 of the Penal code expressly states that **“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”**

The circumstances of the theft are that the accused person had initially stolen from his mother and she had forgiven him, he then stole a second time. In doing so he threatened his mother while armed with a panga. His mother had to run off and seek help by reporting at the police station. The nature of the thing stolen was chicken valued at Kshs 800/= however the circumstances of the theft include the appellant threatening his mother even after she had forgiven him. The accused person cannot rely on him being drunk as mitigation for an act he committed twice within a span of 4 days, facts to which he confirmed at the time he took plea.

Fine for the offence is discretionary and not mandatory. Given the circumstances of the case the Magistrate was right in not giving an option of fine. He wanted to teach the Appellant a lesson that crime does not pay. The sentence was not excessive as he got only 12 months of which is a $\frac{1}{3}$ of the maximum sentence for the offence which is 3 years. The appeal therefore lacks merit and is dismissed.

Judgment read and signed in the open court in presence of Ms. Kiptoo for the state and the appellant who is in person, this 23rd January, 2018.

S. M. GITHINJI

JUDGE

23.1.2018