



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE APPEAL NO. 65 OF 2017

DOUGLAS KOOME KIMATHIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L Mutai Chief Magistrate dated 17th March 2017 in Nanyuki Chief Magistrate Court Criminal Case No. 1496 of 2016)

JUDGMENT

1. DOUGLAS KOOME KIMATHI (the appellant) was charged, before the Nanyuki Chief Magistrate's Court, with the **Offence of theft of a motorcycle Contrary to Section 278A of the Penal Code**. He pleaded guilty whereupon the trial court sentenced him to serve 2 ½ years in prison.

2. The facts narrated by the prosecution, before the trial court sentenced the appellant was that, the complainant had employed the appellant as a motor cycle rider. The appellant was so employed on 1st July 2016. On 9th October 2016 the appellant disappeared with the complainant's motor cycle. The appellant was eventually arrested in Sagana area and the subject motor cycle was recovered.

3. After the trial court entered a guilty plea it invited the appellant to present his mitigation. The trial court's record shows that the appellant offered no mitigation.

4. The trial court in sentencing had this to say:

“SENTENCE:

As accused is a first offender and although the stolen motorbike has since been recovered, It is clear that he is not remorseful that he committed the offence as charged. The offence is serious and a punishment called for, which punishment will serve as a lesson not only to the accused person but also to the other would be offenders. accused sentenced to 2 ½ years imprisonment 14 days right to appeal.”

5. The appellant was aggrieved by his sentence and has filed this appeal against the same.

6. His grounds of appeal, really, amount to mitigation. He stated therein that he was a first time offender; he was remorseful; he promises to always obey the law; and that he requests he be given one more chance.

7. It is unfortunate that the appellant did not voice those mitigation before the trial court. Indeed when

given the opportunity to mitigate he remained mum.

8. Under **Section 278 A of the Penal Code** under which Section the appellant was charged it is provided that, on conviction one is liable to be sentenced to 7 years imprisonment. 7 years imprisonment therefore is the maximum sentence.

9. The appellant was first time offender and he pleaded guilty to the offence.

10. The trial court took into account that the appellant was a first time offender but in sentencing the trial court failed to state that it has taken into account that he had pleaded guilty.

11. The appellant before being sentence to 2½ years imprisonment had been at remand for 5 months. The trial court did not, as required under **Section 333 of the Criminal procedure Code**, taken into account that period he was in remand and did not given credit for the same. Section 333 under the Provision in Subsection (2) states:

“Provided that where the person sentenced under Subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in Custody.”

12. In view of what is stated above this court is of the view that it can interfere with the trial court’s sentence. This court is of the view that had the trial court considered the appellant pleaded guilty and that he had spent five months in remand it would have given a more lenient sentence.

13. The judgment of this court in view of the above finding is that the appeal of Douglas Koome Kimathi, against sentence, succeeds. The trial court’s sentence is hereby set aside and Douglas Koome Kimathi is hereby sentence to serve imprisonment for the period already served. **Accordingly an order is hereby issued that Douglas Koome Kimathi be released from custody unless he is otherwise lawfully held.**

Dated and Delivered at Nanyuki this 14th February 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Douglas Koome Kimathi

For state:

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE