



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 18 OF 2017

ERICK ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal

Case No.205 of 2017 of the Chief Magistrate's Court at

Busia by Hon. J.N Maragia– Resident Magistrate)

JUDGMENT

1. ERICK ODHIAMBO the appellant, was convicted after pleading guilty to the offence of stealing contrary to section 275 of the Penal Code.

2. The particulars of the offence were that on 3rd February 2017 at **KORINDA** G.K Prison Canteen in **BUKHAYO WEST** Location of Busia County, stole one mobile phone valued at Kshs. 12,000/= the property of **JOSEPH OKOTH ODHIAMBO**.

3. He was sentenced to serve three years' imprisonment. He now appeals against the sentence.

4. The appellant was in person. He contended that the sentence was harsh and excessive and that his mitigation was disregarded.

5. The state opposed the appeal through Mr. Omayo, the learned counsel. He argued that the sentence was lawful considering he was a repeat offender.

6. The facts of the prosecution case were briefly as follows:

On the 3rd February 2017 at about 5 p.m the complainant was at the G.K Busia prison Canteen. When he went to answer a call of nature, he left his phone. On returning, he found the phone missing and the appellant was suspected. A search was mounted. He was traced but the phone was not recovered.

7. He pleaded guilty to the offence.

8. Section 275 of the Penal Code provides as follows:

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.

He was therefore sentenced to the maximum provided by the law.

9. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **NELSON vs. REPUBLIC [1970] E.A. 599**, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established.

The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.

In the instant case, the appellant was a repeat offender. Although the appellant was a repeat offender, in the circumstances of this case the sentence is manifestly excessive. I will therefore interfere with the sentence and reduce the same to two years' imprisonment.

DELIVERED and SIGNED at BUSIA this 15th day of March, 2018

KIARIE WAWERU KIARIE

JUDGE