



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 138 OF 2016
(STEALING)
(CORAM: J.A. MAKAU – J.)

DUNCAN OCHIENG OUMA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(From an Appeal against both the conviction and the sentence dated 17.08.2016 in Criminal Case No. 520 of 2016 in Ukwala Law Court before Hon. G. Adhiambo-SRM)

J U D G M E N T

1. The appellant **DUNCAN OCHIENG OUMA** was charged with an offence of stealing contrary to **Section 275 of the Penal Code**. The particulars of the charge are that between 1st day of February 2016 and 31st day of July 2016 at Ugunja Township in Ugunja sub-county within Siaya County, jointly with others not before court stole 24(twenty four) pieces of MDT block board valued at Kshs.96,000/= property of **DAVID OCHIENG NUNDU**.
2. The appellant pleaded guilty to the charge and admitted the facts of the charge as true and consequently was convicted and sentenced to serve 18months imprisonment.
3. Aggrieved by the sentence the appellant filed what he refers to as mitigating grounds as follows: -
 - a) *That the appellant was in state of confusion hence pleaded guilty to the offence in question.*
 - b) *That the appellant is an orphan married with tender children who depend on him for socio-economical needs.*
 - c) *That the appellant's incarceration would be continued infringement to the rights of the vulnerable children whom since have dropped out of school.*
 - d) *That the appellant's mother is sickling and not able to single handedly take care of them (family).*
 - e) *That the appellant is businessman with a blacksmith kind of business where he positively affects the society and as well earns a living from the job.*

f) That the appellant begs leave the Honourable Court to give him an option of a fine to enable him rescue the susceptible children and his threatened business early enough.

4. The appellant prayed that the sentence meted against him be set aside and substituted with an option of fine.

5. The State submitted that the trial court was lenient as the appellant was given half of the maximum sentence.

6. **Section 275 of the Penal Code** under which the appellant was charged provides that: -

“275. 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.”

7. The facts of the case are:- that on 31/7/2016 the complainant David Ochieng who was the caretaker of a flat under construction in Ugunja was doing normal check up on the building when he noticed that the watchman of the said building was missing and had also thrown the keys of the building into the building. Upon further peeping into the corridor, he realized MDT blockboards were missing. He made a report at Ugunja Polic Station. He then went to check the records for the MDT blockboards and established that in the delivery note a total of 30blockbards had been delivered and out of which 24 were missing. He only found 6 blockboard which had been cut into 3 pieces and had been kept at *Juakali Market* by the accused who was selling them to any willing buyer. The suspect was arrested much later after he went into hiding for some time. He was then charged. The value of the block boards that the accused stole was Kshs.96,000/=. The 3 block boards recovered were produced before court.

8. I have very carefully considered the mitigation grounds in favour of the appellant. The mitigating grounds were raised at the Lower Court and were considered. The fact that the appellant is an orphan, married with children of tender years should have been an incentive for him to engage in honest undertakings rather than stealing from his employer. His incarceration is lawful and cannot as he urges, be an infringement to the rights of his children. The trial court considered the mitigation which I have also considered and I find the sentence meted is lenient in view of the fact that as a caretaker, he abused the trust vested in him, by stealing the materials he was supposed to protect, worth of Ksh.96,000/=. That though block boards were recovered, they were already of no value to the owner, as they had been cut into smaller pieces, which were being sold by the appellant from a *Juakali Market*. I find no justification to interfere with the sentence meted as it is lawful and merited.

9. **The upshot is that the conviction is upheld and sentence confirmed.**

DATED AND SIGNED AT SIAYA THIS 30TH DAY OF MARCH 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Appellant: in person, present

M/S Odumba: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J. A. MAKAU

JUDGE