



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 66 OF 2016

NICHOLAS NDAKU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 238 of 2016 in the Senior Resident Magistrate's Court at Taveta delivered by Hon J. Omburah (SRM) on 7th December 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Nicholas Ndaku and his three (3) Co-Accused persons, namely Madaraka Malio, Johnes Musyoka and Moris Kioko were tried and convicted by Hon J. Omburah, Senior Resident Magistrate for the offence of stealing contrary to Section 306(a) of the Penal Code Cap 63 (Laws of Kenya). They pleaded guilty to the charge and were each sentenced to eighteen (18) months imprisonment.

2. The particulars of the charge were as follows :-

“On the 29th day of November 2016 at (sic) unknown time at Lumi area within Taita Taveta County broke into Lumi Primary School and committed therein a felony namely stealing.”

3. Being dissatisfied with the said judgment, on 15th December 2016, the Appellant herein filed a Petition of Appeal against the sentence only. He relied on six (6) grounds in which he sought to be given the option of paying a fine or to serving the remainder of his sentence under a Community Service Order (CSO). He based his prayer on the ground that he was a first offender, he was the sole breadwinner of his family and that the sentence that was meted upon him was harsh, severe and manifestly excessive.

4. A perusal of the proceedings reveals that on the 29th November 2016, the Appellant and his three (3) Co-Accused persons broke into a school and stole three (3) metallic doors valued at Kshs 30,000/=. One (1) metallic door, which was returned to the Complainant after the conclusion of the case, was recovered at Elerai Market. However, two (2) metallic doors were sold to unknown or undisclosed third parties.

5. In his mitigation, the Appellant prayed for leniency. The Learned Trial Magistrate observed that the Appellant and his Co-Accused persons stole from a school that belonged to the entire community and as a result of which he was deserving of a custodial sentence.

6. Section 306(a) of the Penal Code provides as follows:-

“Any person who-

breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling- house and occupied with it but is not part of it, or any building used as a place of worship commits a felony therein is guilty of a felony and is liable to imprisonment for seven years.”

7. In considering whether or not the Appellant could be fined as opposed to being imprisoned, this court had due regard to Section 26(3) of the Penal Code Cap 63 (Laws of Kenya) provides as follows:-

“A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”

8. Further, Section 28 (1) of the Penal Code provides as follows:-

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply-(b) in the case of an offence punishable with fine or a term of imprisonment, the imposition of a fine shall be a matter of discretion of the court(emphasis court).”

9. Appreciably, sentencing is an exercise of discretion by a trial court and an appellate court ought not to interfere with such sentence unless such sentence is illegal, unlawful or is manifestly excessive, harsh and severe. Be that as it may, during an appeal, an appellate court is not prevented from considering other options of penalty that it can impose on a convicted person. This is, however, feasible only where the penalty prescribed is not mandatory or the minimum sentence.

10. Evidently, Section 306(a) of the Penal Code does not provide for a mandatory sentence. A fine can therefore be imposed in place of imprisonment. A quick calculation by the court showed that each metallic door that the Appellant and his three (3) Co-Accused persons stole was valued at Kshs 10,000/=. In view of the fact that two (2) doors were never recovered, the actual value of the items that the Appellant and his Co-Accused persons stole was Kshs 20,000/=.

11. Appreciably, while the penalty that was imposed by the Learned Trial Magistrate was within his discretion because the maximum sentence he would have imposed on the Appellant was seven (7) years, it was this court’s view that the said sentence was not proportionate to the value of the items he stole with his Co-Accused persons making the sentence that was meted upon the Appellant appear harsh.

12. In the case of **Beshick Mombo Mwake vs Republic [2016] eKLR**, this very court reduced the sentence of harsh, severe and manifestly excessive three (3) years imprisonment to three (3) months imprisonment as the appellant therein had stolen three (3) pieces of timber valued at Kshs 1,500/=.

13. Purely on the principle of proportionality and the fact that the Appellant pleaded guilty to the offence in the first instant saving the Trial Court judicial time in hearing the case, this court was persuaded to find and hold that a sentence of twelve (12) months was adequate punishment.

14. The Appellant herein has since served seven (7) months imprisonment. For that reason, it was this court’s considered opinion that the five (5) months of the sentence that is remaining ought to be served only if the Appellant fails to pay the fine to be imposed upon him in line with Section 26(3) of the Penal Code.

DISPOSITION

15. As the Appellant had pleaded guilty to the Charge, his conviction is hereby affirmed and upheld. However, as seen hereinabove, the Appellant’s Petition of Appeal that was lodged on 15th December 2016

was hereby allowed as regards the imposition of a fine in place of imprisonment as he had sought.

16. For the foregoing reasons, the sentence of eighteen (18) months imprisonment that was meted upon the Appellant by the Trial Court is hereby set aside as the same was manifestly harsh, severe and excessive in view of the circumstances of the case herein and its place it is substituted with twelve (12) months imprisonment.

17. Bearing in mind that the Appellant has already served seven (7) months imprisonment, he is hereby fined Kshs 20,000/= and in default, to serve the five (5) months imprisonment remaining in his sentence.

18. It is so ordered.

DATED and DELIVERED at VOI this 27TH day of JULY 2017

J. KAMAU

JUDGE

In the presence of:-

Nicholas Ndaku- Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk