



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 4 OF 2017

NICHOLAS MBONGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. A. Lorot SPM in Criminal Case No. 21 of 2017, delivered on 9th January 2017 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged with, and convicted of stealing from the person contrary to section 279(a) of the Penal Code on his own plea of guilty, The particulars were that on 5th January 2017 at Kikuyu village of Mathatani location within Machakos County he stole Kshs 2,600, the property of, and from the person of Mutua Kakunga Njoroge. He was sentenced to serve two (2) years imprisonment for the offence.

The Appellant has now preferred this appeal against the sentence only, as stated in the Petition and Memorandum of Appeal filed in Court on 16th January 2017, wherein he states that he is a first offender, last born to his single mother and married, and is the sole breadwinner of his family. Further, that he is remorseful and regrets his actions, and has been reformed and rehabilitated while in prison.

During the hearing of the appeal on 15th June 2017, the Appellant relied on his memorandum of appeal, while the Prosecution indicated that they would make oral submissions. The Court also ordered that the Community Service Officer prepare a report on the Appellant. Further, at the hearing held on 10th October 2017, Ms. Mogoi, the learned Prosecution counsel submitted orally that section 279 of the Penal Code stipulates that the sentence for the offence of stealing is 14 years. However, that considering that the Appellant had pleaded guilty; had indicated in mitigation that the complainant had forgiven him; was a first offender; and the probation report was positive, she was agreeable that the Appellant serves the remainder of his sentence under community service.

I have considered the Appellant's mitigation and the concession by the Prosecution. The issues for determination by this court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction and /or variation.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In the instant appeal, the Appellant was charged with, and convicted of the offence of stealing contrary to section 279(a) of the Penal Code. Section 279 of the Penal Code provides as follows in this regard:

"279. Stealing from the person; stealing goods in transit, etc.

If the theft is committed under any of the circumstances following, that is to say —

(a) if the thing is stolen from the person of another;

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;

(c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;

(d) if the thing stolen is attached to or forms part of a railway;

(e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;

(f) if the thing is stolen from a public office in which it is deposited or kept;

(g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years."

The sentence of 2 years imprisonment meted on the Appellant was therefore lawful to the extent that it is provided for by the said provisions of the Penal Code.

I am however of the view that given that the Appellant was convicted of stealing Kshs 2600/=, the sentence of two years imprisonment while lawful, was excessively harsh in the circumstances taking into account the amount of money stolen. I have also perused the Community Service Orders Officers report filed in Court on 9th October 2017 dated 3rd October 2017 and note that the Appellant is well spoken of by both his family and community members as well as prison authorities. His mother also stated that she compensated the complainant by refunding him the Kshs 2,600/= at Kyumbi police post. The report recommends that the Appellant be considered for community service. Lastly, I note that the Appellant was convicted on 9th January 2017 and has already served 10 months of his sentence, which in my view is enough punishment.

The Appellant's conviction for stealing from the person contrary to section 279(a) of the Penal Code is accordingly upheld, however the sentence of 2 years imprisonment for this conviction is set aside. The Appellant is sentenced to the time served, and he be and is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER 2017.

P. NYAMWEYA

JUDGE