



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NANYUKI  
CRIMINAL APPEAL NO. 74 OF 2017

JANE WAITHERA MUTHARIA.....APPELLANT

*versus*

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Nanyuki*

*Chief Magistrate's Court Criminal Case No. 888 of 2016 by*

*Hon. L. MUTAI Chief Magistrate on 25<sup>th</sup> October 2016 )*

**JUDGMENT**

1. **JANE WAITHERA MUTHARIA** (Jane) was convicted before Nanyuki Chief Magistrate's Court, on her own plea of guilt, to the **offence of theft contrary to section 268 as read with section 275 of the Penal Code**. The trial court sentenced her to 4 years imprisonment. Jane being aggrieved by that sentence has filed this appeal.

2. The facts of the case that were confirmed as correct by Jane were that on 23<sup>rd</sup> July 2016 at Nanyuki town the complainant, Nancy Muthoni Muchiri was telephoned by someone who purported to be an employee of Equity Bank. That person instructed the complainant to switch off her cell phone having the Safaricom line and instructed her to key-in certain information into her Equitel Line to enable it to be updated. The complainant complied and as a result funds were withdraw from her Equity Bank account totaling Kshs.313,566. Some of that money was traced into Jane's bank account.

3. On being convicted Jane informed the trial court that she had children and pleaded for Mercy. The trial court as stated before sentenced her to 4 years imprisonment. In passing that sentence the trial court stated thus:-

***“SENTENCE***

***The accused person mitigation duly considered. Although a first offender the offence committed is serious. The complainant lost her money to the accused person keen on reaping from others sweats. The offence calls for a stern punishment which punishment will not only deter the accused person but also which will serve as a lesson to her also to the other would be offenders. Accused sentenced to serve four (4) years imprisonment.”***

4. **Section 275** of the Penal Code, under which Jane was charged provides:-

***“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.”***

5. Whereas sentencing is always at the discretion of the trial court such a court should bear in mind in exercising that discretion the principles of proportionality the need for deterrence and rehabilitation. In this case the section under which Jane was charged, that is **Section 275** of the Penal Code, provides that unless owing to circumstances to the theft sentence should be 3 years. In other words the maximum sentence is 3 years unless the circumstances of the theft show otherwise. Justice M. Odero in the case **DANIEL JOSEPH KINYANJUI V REPUBLIC [2010]eKLR** considered that section and stated:-

***“With respect to sentence the Appellant was sentenced to serve three (3) years in prison which is the maximum sentence for this offence. MR. ONSERIO Learned State Counsel did concede this appeal with respect to sentence. As a general rule the maximum sentence should be reserved for the worst possible manifestation of any offence. That can certainly not be said to have been the case here. The trial magistrate ought to have taken into account the fact that the Appellant pleaded guilty thereby saving the court from an unnecessary trial. In my view the 3 year maximum sentence was manifestly harsh and excessive in the circumstances. I therefore set aside this 3 year sentence and substitute a term of twelve (12) months imprisonment.”***

6. Do the facts of this case show the worst manifestation of the offence? In my view they do not. I agree with statements of the trial court that through the act of Jane the complainant lost her money but in my view it was not the “worst manifestation” of the theft. It is because of the above finding that the appeal against sentence succeeds.

7. The trial court sentence is hereby set aside. The appellant Jane Waithera Mutharia who was a first time offender is hereby sentenced to one and half years imprisonment which sentence shall start to run from the date of her conviction.

**DATED and DELIVERED at NANYUKI this 29<sup>th</sup> day of NOVEMBER 2017**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Jane Waithera Mutharia .....

For the State: .....

Language: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**