REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 181 OF 2017

OLIVET MUNZATSI SILINGI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

[An appeal from the original conviction and sentence by the Hon. R. Yator SRM, in Eldama Ravine Criminal Case No. 581 of 2017 between Republic vs Olivet Munzatsi Silingi]

JUDGMENT

1. The appellant was on 9/8/2017 convicted and sentenced to 2 years imprisonment on her own plea of guilty for the offence of stealing contrary to section 268 as read with 275 of the Penal Code. The particulars of the offence were given in the charge sheet as follows:-

> ***"Olivet Munzatsi Silingi on the 5th day of August, 2017 at Economy Supermarket, Ravine Township in Koibatek Sub-county within Baringo County stole one popco washing bar soap, a packet of 500ml of KCC fresh milk and two Ng'arisha steel wool each weighing 15 grams all valued at Ksh. 120/- the property of Charles Kimaru Tallam."***

2. The appellant faced an alternative charge of handling stolen property contrary to section 322(1) (2) of the Penal Code. On appeal, the appellants counsel filed written submissions dated 14/11/2017 and made supplementary oral argument raising five principle grounds that:-

> ***(i) The facts read by the prosecution did not substantially relate to the charge against the accused and consequently that the trial court "ought not to have convicted the appellant on the basis of these facts."***
>
> ***(ii) On sentencing the value of the goods at Ksh. 120/- considered the sentence was excessive and the court could have been inflicted by the wrong facts read by the prosecution.***

3. The DPP did not oppose the appeal or sentence urging that the appellant having pleaded guilty had served the court's time in going through the full trial and conceded that the sentence of (2) years imprisonment was excessive being referred to the value of the stolen goods at Ksh. 120/-.

4. The question before the 1st appellate court are whether the conviction was initiated by the prosecution in taking the plea of guilty in the matter and whether, if properly convicted, the sentence imposed on the appellant is excessive in the circumstances of the case.

5. The record of the trial court shows that the charge was read over and explained to the accused in Kiswahili and she responded that "it is true." The facts were thus recorded out as follows:-

> ***"On 7th January, 2017 at 4.00pm the accused herein together with others not before the court went to Economy Supermarket, Eldama Ravine Town and while there shoplifted goods worth Ksh. 40,350/- and they were able to escape though they were captured in CCTV cameras of the supermarket.***
>
> ***On 5th August 2017 at about 4.00pm the accused again with others not before the court, went back to the said supermarket and attempted to shoplift other goods from the super market. However, the attendants were able to notice their intention and were asked to leave the premises. However, the accused was arrested and police called and on arrival at the scene, re-arrested the accused and were able to recover from the handbag black and brown in colour, 1 bar soap mack popco, 1500ml packet of KCC, 2 pieces of Ng'arisha steel wool all valued at Ksh. 120/-. She was arrested and charged with the offence herein, wish to produce her items as exhibit in court."***

6. Although, the CCTV camera footage was not produced, the record shows that the items recovered were produced as exhibit before the

court. More importantly, the appellant accepted the facts as related by the prosecution. I do not find a basis for holding that the plea was equivocal when the record shows that the charge was explained to the accused in Kiswahili language which she understood. It is significant that the accused though unrepresented is in submissions before the court said to be, a teacher, and only suggestion that she did not understand the language is unacceptable. Moreover, the content of the facts of the charge are in plain language with no technical terms that may have confused the appellant in admitting the facts as true.

7. The question of facts stated which did not relate to the charge may be answered with reference to principles of *res gestae* and facts showing system under Section. 6 and 15 of the Evidence Act, while the facts of the events of the earlier shoplifting incident of 7/1/2017 may not be relevant as being part of the *res gestae* under Section 6 of the Evidence Act, they are clearly facts showing system of the appellants shoplifting and clearly admissible under Section 15 of the Evidence Act, the two provisions of the Evidence Act provide as follows:-

> ***"6. Facts which, although not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and place".***

> ***"15. Where there is a question whether an act was accidental or intentional, or done with a particular knowledge or intentions, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant."***

There were no unusual circumstances for supporting that the appellant was confused by the facts, as in ***Ndede v. R*** [1991] KLR 567.

8. I would agree that the value of things stolen is a sufficient consideration in sentencing, the lead decision on this position is that of Bosire, J as he then was, with which I respectfully agree, in ***Ambani v. R*** [1990] KLR 161, where the appellant had been convicted of theft of his employers pair of shorts, valued at Ksh. 40/-, held:

> ***"The appellant was a first offender. The pair of shorts was recovered. He pleaded guilty to the charge on his first appearance in court. He indicated to the trial court that he had a family which depended on him for their needs. The value of the item stolen was minimal that I do not consider the exercise on discretion by the trial court in sentence was proper. Although as rightly pointed out by the trial magistrate that the appellant abused the trust which was bestowed on him by his employer, the item stolen was of so negligible a value that he did not deserve the harsh treatment which the court gave him. Sentences imposed on accused persons must be commensurate to the moral blameworthiness of the offender. Here was a man who may have been tempted to sneak away with an item belonging to his employer. He had a family which depended on him. His imprisonment must have adversely affected that family because they lost the support which the appellant had been offering. It is an improper exercise of discretion not to look on the facts and circumstances of the case in their entirety before settling for any given sentence, as appears to have been the case here. I am compelled to interfere with the sentence meted out to the appellant. The appellant has served more than one year of the sentence which was imposed on him having been sentenced on the 1st February, 1988. I consider that sentence suffices. Consequently I will set aside the sentence of two years imprisonment and in lieu thereof substitute such sentence as will permit the appellant's immediate release from prison unless he is otherwise lawfully held on another warrant."***

See also ***Macharia v. R*** [2003], E.A 559 C.A following ***Ambani.***

9. I find that the sentence of (2) years imprisonment for the theft of the goods valued at Ksh. 120/- is excessive, as the appellant has been in custody for (4) months since conviction and sentence on 9/8/2017, I consider that she has been sufficiently punished for her criminal act of shoplifting.

Orders

10. Accordingly, for the reasons set out above, the Court in exercising its powers under section 354(3)(a)(ii) of the Criminal Procedure Code without altering the finding on conviction, reduces the sentence to such term as will enable the appellant to be released from prison forthwith unless she is otherwise lawfully held.

DATED AND DELIVERED ON 21ST DAY OF DECEMBER, 2017.

EDWARD M. MURIITHI

JUDGE

Appearances: -

M/s E. Wafula & Associates for Appellant

Ms. Macharia, Ass. Director of Public Prosecutions.